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THE LAW OF CONSPIRACY IN ENGLAND AND IRELAND.

IN a recent article in this REVIEW, under the above heading, Mr. Kenelm Digby considers and contrasts the law of criminal conspiracy as at present subsisting in England and Ireland. In tones of almost judicial moderation, he invites us to arrive at the conclusion that the law of criminal conspiracy has of late years been extended by the Irish Judges beyond the limits laid down by English Courts; and, consequently, that certain combinations, which are perfectly innocent in England, have been declared to be criminal, and as such have been made punishable, in Ireland. The steps by which this conclusion is reached may be summarised thus. Mr. Digby examines certain English authorities, and infers from them a definition of criminal conspiracy, which is more limited than the decisions justify. He then examines certain Irish authorities, and infers from them a definition of criminal conspiracy which is more extended than the decisions justify. A comparison based on these inferences leads to the result already indicated. It is a matter of more than speculative interest to consider how far Mr. Digby's views can be supported.

The Irish cases considered by Mr. Digby fall under two heads: first, cases of prosecution for criminal conspiracy under the common law[1]; and secondly, cases of criminal conspiracy decided under the second section of the Criminal Law and Procedure (Ireland) 1887, generally known as the Crimes Act[2]. It will be convenient to deal with each of these heads in order.

As regards prosecutions for criminal conspiracy under the common law, Mr. Digby refers to two cases, namely, that of *R.* v. *Parnell* and *R.* v. *Dillon*, and states his conclusion thus:—'Thus the step was taken in Ireland which, as has been shown, had never been taken

[1] *Supra*, pp. 138, 139.

[2] *Supra*, pp. 139–142.

by any English Court; and it was in effect declared that an agreement to break a contract was in itself an indictable offence[1].'

Now the first, and possibly a sufficient, answer to this conclusion of Mr. Digby's is, that no Irish Judge ever made the sweeping declaration that 'an agreement to break a contract is in itself an indictable offence.' But, as it is desired to deal with the substance of Mr. Digby's contention, and not with isolated expressions, it will be well to examine a little more closely into the two cases he has cited.

In *R.* v. *Parnell*[2] a criminal information containing several counts was laid against Mr. Parnell and thirteen of his colleagues. For the present purposes it may be sufficient to refer only to the first count, which charged that the traversers *with intent to injure owners of farms* let to tenants in consideration of payment of rent, conspired to incite tenants *in breach of their contracts of tenancy* to refuse to pay the rents which they were legally liable to pay, *to the great damage of the owners.*

It will be observed that the offence charged was in no sense a mere agreement or combination to break contracts. The combination alleged involved also damage to the landowners and the violation of their legal rights. Moreover (as pointed out by Lord Fitzgerald in his charge to the Jury[3]) it was a combination to incite tenants, not only to refuse to pay the rents they were legally bound to pay, but to retain possession of the farms against the law of the country.

Before dealing with Lord Fitzgerald's charge, it may be well to consider what is the law as laid down by English Judges on the subject. Mr. Digby would have us to infer[4] that a combination to injure an individual or a class is not in any case an offence by the law of England, unless criminal means are used. It is conceived that this view cannot be supported. The true view to be gathered from the authorities appears to be, that where the 'injury' involves the invasion of a legal right, the combination to do the injury is criminal.

In *R.* v. *Duffield*[5] (decided in 1851) Erle J. said, 'A conspiracy to injure—two men *combining to interfere with a man's civil right*—is indictable.' Again, in *R.* v. *Rowlands*[6] (1851) the same Judge, after stating that it was lawful for persons to combine for their own benefit, added, 'But I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is a combination of a different

[1] *Supra*, p. 139.
[2] 14 Cox, 508.
[3] 14 Cox at p. 517.
[4] *Supra*, p. 133.
[5] 5 Cox, 404.
[6] 17 Q. B. 671.

nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another.'

It is important to notice that this summing up of Erle J. in *R.* v. *Rowlands* is referred to with approval by Lord Campbell, Patterson J., and Coleridge J. in the same case [1], and more recently by two Judges of the highest eminence, Lord Justice Bowen and Lord Justice Fry, in the case of *Mogul Steamship Co.* v. *M^c^Gregor Gow & Co.* [2], which was decided in July 1889, and which will be presently referred to at length.

To the same effect is the Report (quoted by Mr. Digby) in 1875 of the Royal Commission, presided over by the late Lord Chief Justice Cockburn [3]. According to that authority, a conspiracy exists 'when with a malicious design to do an injury, the purpose is to effect a wrong, though not such a wrong as when perpetrated by a single individual would amount to an offence under the criminal law.' Mr. Digby appears [4] to lay somewhat undue stress on the use of the expression 'malicious design;' it may therefore be well to quote from a later portion of the Report [5]. 'The law, therefore, and as it seems to us wisely and justly, established that a combination of persons *to commit a wrongful act with a view to injure another* shall be an offence, though the act if done by one would amount only to a civil wrong.' The meaning of the word 'malicious' may, in fact, be illustrated by the language of Lord Esher [6] in the *Mogul Steamship* case. 'The word malice is satisfied by the thing being done with the knowledge of the plaintiff's right, and with intent to interfere with it "maliciously," or, which is the same thing, "with notice." Per Crompton J. in *Lumley* v. *Gye* [7].'

The latest and most authoritative statement of the law on the subject is to be found in the judgments of Lord Justice Bowen and Lord Justice Fry in the *Mogul Steamship* case. Lord Justice Bowen says [8]:—

'Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own

[1] 17 Q. B. at p. 687.
[2] 23 Q. B. D. 598, at pp. 618, 625.
[3] Parliamentary Papers, 1875.
[4] *Supra*, p. 135.
[5] Report, p. 26.
[6] 23 Q. B. D. at p. 609.
[7] 2 E. & B. at p. 224.
[8] 23 Q. B. D. at pp. 616–619.

just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy; see *Skinner* v. *Gunton*[1]; *Hutchins* v. *Hutchins*[2]. But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means: *O'Connell* v. *The Queen*[3]; *R.* v. *Parnell*[4]; and the question to be solved is whether there has been any such agreement here.'

The Lord Justice then takes the cases of certain particular combinations[5], and in answer to the enquiry whether they are such as to amount to an indictable conspiracy, he proceeds:—

'In cases like these where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without "just cause or excuse"? If it was *bonâ fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing up of Erle J., and the judgment of Queen's Bench in *R.* v. *Rowlands*[6]. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, or without any of the illegal acts above referred to, it could not in my opinion properly be said that it was done without just cause or excuse.'

The judgment of Lord Justice Fry is substantially to the same effect. The true distinction would appear to be that, whereas a combination to promote the lawful rights of those who combine is lawful, even though damage to individuals may result, a combination to do acts in violation of the lawful rights of others and

[1] 1 Wms. Saund. 229. [2] 7 Hill's New York Cases, 104.
[3] 11 Cl. & F. 155. [4] 14 Cox, Criminal Cases, 508. [5] 23 Q. B. D. at p. 618.
[6] 17 Q. B. 671.

necessarily resulting in damage to those others, is civilly actionable and is also criminal.

It is important and interesting to notice that the same doctrine has been quite recently laid down in Ireland by Chief Baron Palles in a case of *Kearney* v. *Lloyd* [1], where the learned Judge laid it down that in order that a combination to injure should be either actionable or criminal it is necessary that the 'injury' should amount to an invasion of a legal right.

One more authority may be quoted, to show the view of the law adopted by English text-writers. In Archbold's 'Criminal Law,' twentieth edition (published in 1886), at p. 1087, it is stated that 'Conspiracy' (meaning criminal conspiracy) 'is' (among other things) 'an agreement of two or more persons wrongfully to injure a third person or to injure any body of persons.'

It is conceived, that the great weight of these authorities is not seriously affected by the somewhat doubtfully expressed opinion of Mr. Wright in a book published in 1873, or by the fact, alluded to by Mr. Digby, that a combination wrongfully to injure a person or persons is not included in the enumeration of criminal conspiracies which is given in the Report of the Criminal Code Commissioners in 1878.

Turning now to Lord Fitzgerald's charge to the Jury in *R.* v. *Parnell*, it is important, in order to see whether the law there laid down really went beyond the principles established by English decisions, that the charge should be read *in extenso*. It will be found that he expressly bases his views on the opinion of Chief Justice Tindal given to the House of Lords in *O'Connell* v. *The Queen* [2], and the opinion of Mr. Justice Willes, given to the House of Lords in *R.* v. *Mulcahy* [3], and generally on the law as established in England. He proceeds: 'I have to declare to you that it is a criminal offence when two or more agree to do an injury to a third party or class, though that injury if done by one alone of his own motion would not be in him a crime or offence, but would be simply an injury carrying with it a civil remedy.' So far the ruling of Lord Fitzgerald is merely a repetition of what has already been shown to be established by the highest English authorities. The learned Judge however also stated (in a passage quoted by Mr. Digby): 'If a tenant withholds his rent, that is a violation of the right of the landlord to receive it; but it would not be a criminal act in the tenant, though it would be in the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is by the law of the land an offence.' In order to test this state-

[1] 26 I. L. R. 268. [2] 11 Cl. & F. 155. [3] L. R. 3, H. L. 117.

ment, let us apply the principles laid down by Lord Justice Bowen in the case already cited (23 Q. B. D. at pp. 618, 619). The combination is to incite tenants to withhold the rents they are legally bound to pay. The act to be done (the withholding of rents) is intentional, and it is calculated to do harm to the landlords. It is not done in the exercise or enjoyment of the tenant's legal rights, or for the purpose of obtaining a lawful benefit for the tenants. On the contrary, it is done in violation of the landlord's rights, and for the purpose of obtaining an unlawful benefit for the tenants, and with the necessary result of damaging the landlords. It is therefore, in the language of the Lord Justice, done 'without just cause or excuse.' It necessarily follows, that the combination is a criminal one.

If it be urged that there is no express statement by an English Judge that a combination to incite tenants not to pay their rents legally due is an offence, the answer is, that the precise case has never come before an English tribunal. To apply undoubted principles to a new state of facts is not to extend the law. It will be noted that there is no trace in Lord Fitzgerald's ruling of the very wide general proposition attributed to him by Mr. Digby, (namely) that an agreement to break a contract is in itself an indictable offence.

I pass to the other Irish case cited by Mr. Digby in regard to prosecutions for criminal conspiracy under the common law, the case of *R.* v. *Dillon*. To understand this case a short reference must be made to the origin of that prosecution, namely, Mr. Dillon's action in reference to the Plan of Campaign. The Plan of Campaign was first clearly expounded and advocated by Mr. Dillon in a speech at Woodford on the 17th Oct., 1886. The report of that speech in 'United Ireland' of Oct. 23, 1886, contains the following passages:—

'What is the policy which the National League lays before you? . . . When we meet with an estate, where the people are courageous and determined, we advise them to meet together, each estate by itself, and decide what is a reasonable and fair reduction to ask. In some cases fifty or sixty per cent. would be reasonable: in some cases less, and in some more. Let the tenants meet together and ask what is fair to ask, and ask that together, and if they are refused there is but one course open to them if they mean to fight according to the policy of brave men—that is to pay a portion of the rent which they have offered to the landlord into the hands of two or three men in whom they place trust. That must be done privately, and you must not inform the public where the money is placed. . . . If you mean to fight really, you must put the money

aside for two reasons; first of all, because you want means to support men who are hit first; and secondly, because you want to prohibit traitors going behind your back.'

The policy was further explained by Mr. Dillon in a speech he made at Murroe (Co. Limerick) on the 21st Nov., 1886, when he advised the tenants to 'do everything in their power to make the landlord sorry for his action' (i. e. his action in evicting certain tenants); and he told them it was 'the duty of every man in the locality not to pay the landlord any rent until the evicted tenants were re-instated.' On the 30th Nov. Mr. Dillon was summoned before the Queen's Bench in Dublin to show cause why he should not be bound over to keep the peace on account of his Murroe speech. The judgment of Mr. Justice O'Brien, as reported in the 'Freeman's Journal' of Dec. 15, 1886, directing Mr. Dillon to give the required bail, deserves to be studied in its entirety. One passage, however, must be quoted to show the grounds on which the Judge proceeded. He says:—

'The organisation which he (Mr. Dillon) has recommended and enforced with so much eloquence and power and sincerity of conviction *is not merely a combination not to pay rent.* . . . This is a combination that seeks to carry out its objects amongst other means by removing rents from the power of those who are to pay and those who are to receive them by placing them in other hands, subject to loss and waste and risk, and by devoting these rents to other and entirely different objects from the performance of the contracts, to the faithful performance of which, in justice and in right, they were subject. The law admits of no doubt as to the character of that organisation. It is clearly, distinctly, and absolutely illegal.'

This quotation is useful in enabling us to understand the short extracts quoted by Mr. Digby from the charge of Mr. Justice Murphy to the Jury in *R.* v. *Dillon*[1]. In that case Mr. Dillon and others were indicted for criminal conspiracy in connection with their advocacy of the Plan of Campaign. The learned Judge, in the early part of his charge, stated that 'conspiracy in the eye of the law was nothing more than an agreement of two or more persons wrongfully to injure another person or body of persons.' Later on in his charge, he put the question thus: 'Did the traversers urge the tenants *in order to defeat the execution of lawful rights* to combine for that purpose to refuse to pay the rents they had contracted to pay? If they did, they committed the offence charged in seeking to frustrate the landlord's claim.' He also stated (in effect repeating Lord Fitzgerald's ruling) that it was 'an offence for two or more

[1] Times, 24 & 25 Feb. 1887.

persons to urge tenants not to pay the rents they had contracted to pay. Any body of men who urged tenants to adopt means whereby to render unavailable the legal remedies for enforcing payment of rents were guilty of the crime of conspiracy.'

Such being the facts, can it fairly be said that Lord Fitzgerald and Mr. Justice Murphy (as stated by Mr. Digby) really 'took a step which had never been taken by any English Court'? It is submitted that the exact reverse is the truth. Will Mr. Digby undertake to say that any English Judge would have charged the Jury in the cases of *R.* v. *Parnell* and *R.* v. *Dillon* in a manner differing in any material respect from the charges of Lord Fitzgerald and Mr. Justice Murphy? It is not a little remarkable, that although the case of *R.* v. *Parnell* was heard in 1881, the discovery (if it be a discovery) of the singularity of Lord Fitzgerald's summing-up in that case does not appear to have been made by any writer of authority until the publication of Mr. Digby's article in April, 1890. On the contrary, the case is referred to, not only without disapproval, but as an authority, by Lord Justice Bowen in the *Mogul Steamship* case[1], and is similarly quoted in a text-book of considerable weight, namely, Roscoe's 'Criminal Evidence[2].'

It is now proposed to examine Mr. Digby's contention that 'a further development of the law of Criminal Conspiracy, either as a distinct addition to the law or as a statutory declaration of what had previously been undefined and uncertain, is probably to be found in the construction which has been placed upon the second section of the Criminal Law and Procedure (Ireland) Act, 1887.'

The judgment of Chief Baron Palles in the case of *In re Heaphy*[3] has been sometimes misapprehended. The effect of the judgment was in the first place to limit the application of the section to those cases of conspiracy where there was a combination involving *compulsion*, either in the grosser form of intimidation, force, or restraint; or in the more subtle form of undue influence. The Chief Baron held that, inasmuch as the words 'with intent to injure' were not in the section, a conspiracy with intent to injure, even though indictable at common law, would not fall within the section, unless it was also a conspiracy 'to compel or induce.' In the case under consideration it was held, that although there was evidence of a conspiracy with intent to injure the police, that is, of a conspiracy indictable at common law, there was no evidence or sufficient

[1] 23 Q. B. D. at p. 616. [2] 10th ed. p. 423.

[3] 22 L. R. I. 500. This case and also many other important decisions of the Irish Superior Courts in cases under the Crimes Act of 1887 and other cases, have recently been published in a very useful volume of Judgments, printed in Dublin in 1890 at the Queen's Printing Office. Reference will be made hereafter to this volume as 'Judgments.'

evidence of a conspiracy 'to compel or induce' persons not to deal with the police, and there was therefore no jurisdiction to try the prisoners under the second section of the Crimes Act.

Having limited the operation of the section in the manner pointed out above, and having laid it down that the criminal element in the conspiracy, to be within the statute, must be found in the words 'compel' and 'induce,' the Chief Baron went on to consider what must be the meaning of the word 'induce' in order to render the conspiracy criminal. In considering this question, the Chief Baron had recourse to the principles which had been enunciated by a great English Judge, Lord Bramwell[1]; and held that the inducement must be such as to unduly affect or control the freewill or (as he himself explained in a later case[2]) the freedom of action of the person against whom it is exercised.

Mr. Digby's comment on this decision is that 'if the interpretation thus put upon the statute by the Chief Baron is correct, it would seem that the section marks another step in the progress of the law of conspiracy.' This appears to be hardly an accurate way of putting the case. The Legislature took no new step whatever. The section is in terms limited to 'criminal conspiracies now punishable by law;' and the Chief Baron expressly states in his judgment[3] that a conspiracy cannot fall within the section, unless it was one which would have been 'criminal' before the Act. He then decides, following Lord Bramwell, that a conspiracy of which the object is unduly to affect or control the freewill or freedom of action of the person 'induced,' is a criminal conspiracy within the section, that is, is a conspiracy which would have been criminal before the Act. If the Chief Baron is right, *cadit quaestio.* If the Chief Baron is wrong (and this hypothesis is put for the purpose of giving the widest scope to Mr. Digby's argument), he errs through having followed (as Mr. Digby himself admits he did follow) Lord Bramwell. In either case, the Chief Baron introduced no principle into the Irish law which had not previously been laid down by English Courts. Certainly the Legislature introduced no new principle.

Mr. Digby makes a further comment. He says that if the Chief Baron's interpretation of the statute be correct, 'the Legislature has adopted the view of those Judges, who have laid down in the broadest terms the definition of undue coercion or inducement, *in preference to the view of those who think* no coercion or inducement criminal unless criminal means are contemplated.' Passing by the apparent confusion (which has already been commented on above) between the declaration of the Legislature and the declaration of

[1] *R.* v. *Druitt*, 10 Cox C. C. 600. [2] *R.* v. *Farrelly & Clarke*, Judgments, p. 225.
[3] *Re Heaphy*, Judgments, 127, at p. 148.

the Chief Baron, it is fair to ask this question, Who are those who think 'no coercion or inducement criminal unless criminal means are intended'? Amongst that category of thinkers Lord Justice Fry is certainly not to be numbered. In the *Mogul Steamship* case, after referring to the Trades Union Acts of 1871 and 1875, he continues (23 Q. B. D. p. 630): 'But whilst the Legislature thus set masters and men respectively free to combine, they *reasserted* the illegality of using violence, threats, *molestation, obstruction, or coercion.*

In this connection[1], it is important to observe that even in the case of combinations in furtherance of trade disputes, certain acts of coercion are expressly by statute declared to be criminal, although no means which are ordinarily known as criminal are intended. The Conspiracy and Protection of Property Act, 1875, enacted (s. 3) that a combination to do any act in furtherance of a trade dispute shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a 'crime;' and 'crime' for the purposes of the section was so defined as to include the case (see s. 7) of every person who, 'with a view *to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing* wrongfully and without legal authority, (1) uses violence to or intimidates such other person or his wife or children or injures his property; or (2) persistently follows such other person about from place to place; or (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or (5) follows such other person with two or more persons in a disorderly manner in or through any street or road.'

A careful study of this Act is recommended to those who suggest that the freedom of workmen to combine is widely different from the freedom of tenants to combine. The question cannot be fully dealt with in this paper. But the following considerations may be noted. (1) Combinations of workmen which involve any of the modes of compulsion or undue influence specified in the Statute of 1875 are criminal, although they do not involve what are generally known as criminal acts. (2) The modes of compulsion and undue influence specified in the Statute of 1875 closely resemble in many ways some of the modes in which boycotting is carried on in Ireland. (3) There is no real analogy between a combination not to work for less than a certain wage, where the parties combining retain nothing belonging to the employer; and a combination not

[1] See Mr. Digby's remarks, *supra*, pp. 132, 136.

to pay rents legally due, where the tenants, while remaining in the occupation of land, combine to withhold the rents.

Mr. Digby, in the closing part of his article, makes some general comments, not indeed on the actual, but on the possible theoretical working of the second section of the Crimes Act. He says [1], 'The adoption of the *largest and most indefinite view of the law of conspiracy* leaves the *tribunal practically without a check*, except by way of appeal on the question of fact, when the sentence is sufficiently severe,—never a very efficient remedy.' And again, 'It is permissible to question whether it is wise to leave to justices powers so vast and indefinite as are involved in determining *without further guide than their own sentiments* what is and what is not undue or improper inducement.' (The italics are not Mr. Digby's.)

The question of the 'adoption of the largest and most indefinite view of the law of conspiracy' has been already dealt with. The statement as to the 'tribunal being practically without a check,' appears to be inaccurate in several highly important particulars. A prisoner convicted under the second section of the Act has in fact three courses open to him. Either (1) he can, if the sentence is more than a month, appeal to the County Court Judge. There is a complete rehearing of the case, and the decision of the magistrates can be reviewed, not only on questions of fact, but of law. Or (2) he can, whatever be the sentence, apply to the magistrates to state a case under the 20 & 21 Vict. c. 43; and the duty of the magistrates upon such an application is defined by the second section of that Act, and is 'to state a case setting forth the facts and the grounds of such determination;' and under the sixth section, the Court (that is, one of the Superior Courts) is 'to hear and determine the question or questions of law arising,' or the determination of the magistrates, and the Court can either affirm the conviction, quash the conviction, or send the case back to the magistrates with an expression of the Court's opinion [2]. If the magistrates refuse to state a case, they may be compelled to do so by *mandamus*. But (3) there is a third course open to the prisoner, and this is in many cases the most important right of all. He can, whatever be the length of the sentence, apply to the Exchequer Division for a *habeas corpus*; and on the hearing of the application the Court will look into the depositions which were taken before the magistrates [3]; and if the Court is of opinion that there was no evidence sufficient to sustain

[1] *Supra*, p. 142.

[2] *R.* v. *O'Brien*, Judgments, p. 281.

[3] S. 11, subs. (5) of the Crimes Act provides that 'Upon every proceeding before a Court of summary jurisdiction for an offence under this Act, the evidence for the prosecution and defence shall be taken as depositions in the same manner as if the offence were an indictable offence, and such depositions shall be admissible in evidence on any appeal.'

the conviction, the prisoner will be released. This method of procedure was established by the decisions of the Exchequer Division in *Re Sullivan* (22 L. R. I. 98; Judgments, p. 97), and *Re Heaphy* (22 L. R. I. 500; Judgments, p. 127). Its importance, as bearing on the general comments of Mr. Digby already quoted, cannot be over-estimated[1]. It establishes a method of appeal from the decisions of magistrates which is unknown in England, and furnishes the Irish prisoner with a method of asserting the liberty of the subject which the Englishman in similar circumstances cannot assert.

The considerations put forward in this paper appear to lead to the following general conclusions. The rulings of the Irish Judges in cases of prosecutions for criminal conspiracy under the common law follow, and strictly follow, English precedents. The working of the second section of the Crimes Act is so fenced about with restrictions and safeguards that failure of justice (except such possible failure as is incident to all tribunals whether civil or criminal) is not to be apprehended. It is doubtless desirable in England as well as in Ireland that (as Mr. Digby says) crime should be clearly and intelligibly defined. But pending the passing of a criminal code or the advent of the millennium (whichever event shall first happen), it would seem to be clearly possible to administer the law in Ireland, whether the common law or the Crimes Act, 'without either serious risk to individuals or danger to the State.'

J. G. BUTCHER.

[1] The decision of the Chief Baron in *Re Heaphy* as to the duty of the Court on an application for a *habeas corpus* to look into the depositions, is of considerable general interest. The Chief Baron based his decision on two propositions of law, either of which in his opinion was sufficient to sustain the decision. The first proposition was founded on the special provisions of the Crimes Act, and was stated to be inapplicable to a conviction under any other statute. It was that 'as it was necessary that the conviction should contain the names of the witnesses, and that their evidence should be on oath and in writing, signed by the witnesses and the Justices or one of them. . . . the statement in the order-book that witnesses were examined amounted to a statement that they were examined on oath and in writing, and thus so referred to the depositions that they should be deemed to be referred to by the conviction, and therefore be capable of being looked to either on *certiorari* or *habeas corpus*' (Judgments, p. 134). The second proposition is founded upon reasoning which may be summarised thus. (*a*) When a prisoner is in custody under a conviction alleged to be made under the authority of a statute (such as the Crimes Act) which does not take away *certiorari*, the prisoner is entitled to be discharged on *habeas corpus* if a *want of jurisdiction to convict* is shown in the magistrates who convicted. (*b*) Jurisdiction to convict exists in the magistrates only if three conditions are fulfilled, (1) if there is jurisdiction to enter on the enquiry; (2) if the evidence is sufficient to warrant the conviction; (3) if the proceedings are in other respects regular in form. (*c*) The duty of the Court on an application for *habeas corpus* is therefore to enquire, (1) Was there jurisdiction in the magistrates to enter on the enquiry? (2) Was there evidence sufficient to warrant the conviction? and (3) Were the proceedings regular in other respects? It is a curious fact that the Queen's Bench Division in Ireland, on an application for a *certiorari* to bring up a conviction by magistrates under section two of the Crimes Act for the purpose of having it quashed, have decided that the Queen's Bench Division have no jurisdiction on such an application to enquire into the evidence given before the magistrates (*R.* v. *Sullivan*, Judgments, p. 130).

POSSESSION IN THE ROMAN LAW.

MR. JUSTICE HOLMES begins the sixth chapter of what has been well termed 'one of the best of books' with this passage. 'Possession is a conception which is only less important than contract. But the interest attaching to the theory of possession does not stop with its practical importance in the body of English law. The theory has fallen into the hands of the philosophers, and with them has become a corner-stone of more than one elaborate structure. It will be a service to sound thinking to show that a far more civilized system than the Roman is framed upon a plan which is irreconcilable with the *a priori* doctrines of Kant and Hegel.'

It does not fall within the scope of this article to discuss comparatively the civilization of the Roman and English law. Many English lawyers have had to breathe an air thick with the incense of centuries offered at the shrine of the Roman idol; and if the acolytes of the reviving national cult do at times swing their censers a little high, they can at least plead, if excuse be needed, the loftiness of the temple of their faith. It would indeed be strange and disheartening if the legal system of the greatest nation of modern times could show no advance on that which was framed by the rulers of the world fifteen hundred years ago. But the recollection of the procedure and in particular the system of pleading, by which the merits of our Common Law were for centuries obscured, might well help to check any tendency to undue self-gratulation.

The Roman law has in this country little more than an academic importance, and the exhaustive treatises on Possession which have issued from German printing presses can only expect to find with us here and there a reader. There are, however, many students of Roman law in our universities, and they should at least be acquainted with the general drift of continental opinion on this topic.

Several German writers, and notably Ihering[1], have tried to clear the Roman law from Mr. Justice Holmes's implied reproach,

[1] Ueber den Grund des Besitzschutzes. Jena, 1869, 224 pp. Der Besitzwille, Jena, 1889, 540 pp.

and whatever the value of his own positive theory may be, Ihering has fully succeeded in showing that the Roman law of possession was framed upon a plan quite as irreconcilable with the doctrines of Kant and Hegel as was our own Common Law.

Mr. Lightwood, in the LAW QUARTERLY REVIEW, Jan. 1877, has given English readers so clear and satisfactory an exposition of Ihering's earlier work as to make it quite unnecessary for me to discuss it here. Of his recently published work, which has been briefly noticed in the L. Q. R., I shall have something to say later on.

'Why is possession protected by the law when the possessor is not also an owner? That is the general problem which has much exercised the German mind[1].' The German mind was, I believe, really exercised by two problems which it failed to distinguish, viz., 'Why should possession be protected?' and 'Why was possession protected in the Roman law?' These two questions are clearly distinct, for while many reasons may be given why possession should be protected, some of them, though quite satisfactory if possessory remedies were now on their trial, would certainly not have been present to the minds of the early jurists with whom these remedies took their rise. The inveterate German habit of regarding the Roman law as 'formulated reason' must be held responsible for the confusion.

It is interesting to contrast the treatment this question has received from German civilians, with the following passage from Sir F. Pollock's 'Essay on Possession in the Common Law' (p. 3). 'Why the law should ascribe possession to wrong-doers may be difficult to explain completely . . . . . The truth is that many reasons of convenience concur to outweigh the apparent anomaly, and of these sometimes one and sometimes another may have in fact been the decisive reason in virtue of historical conditions, or may be regarded as decisive according to the individual genius of this or that philosophic student. The most obvious of them from the point of view of our own time, is, perhaps, that in a settled and industrial state some amount of genuine doubt as to ownership and title must unavoidably follow upon the complexity of men's affairs; that protection must in some measure be given to persons dealing in good faith on the strength of apparently lawful title . . . . . and that such protection cannot be given effectually to the innocent without also protecting some who are not innocent.' Further, 'it can be and has been maintained that on attentive examination the seeming anomaly will be found indispensable for the adequate

[1] Holmes, Common Law, p. 206.

protection of true ownership itself. Another element . . . . . is the interest of public peace and order.'

German jurists, on the other hand, seem to treat the problem as if it were a mathematical one to which there can be only one solution, and each seems persuaded that he alone has worked it out correctly. It is evident that the so-called philosophical ground for the protection of possession is a question to which many different answers have been and probably always will be given.

The other question, that is concerning the historical ground for the possessory remedies in Roman law, is scarcely less difficult to answer; but much of the variety of opinion upon it arises from the confusion of this question with the previous one. If the German civilians, while drawing their picture of the early Roman law of possession, had dismissed their philosophic guides and had kept steadily before their minds the practical Roman farmer for whom, and we may say by whom, the possessory interdict were devised, something like a historical theory might have reconciled us to the loss of much ingenious philosophizing.

The theory which refers the existence of a possessory system to the necessity for the protection of the will of the individual, though it is scarcely holding its ground, probably still counts the greatest number of adherents in Germany. Its essentially modern and un-Roman character apart, Ihering has shown the impossibility of forcing the facts of the Roman law into correspondence with it. It is unnecessary to repeat his arguments against a theory, which, though it may fully satisfy 'the characteristic yearning of the German mind,' has no fascination for the English lawyer, and I mention it here only to quote a remark of Prof. Bekker of Heidelberg, one of the later, and certainly one of the most sensible, contributors to the controversy. Speaking of the two elements for acquisition of possession—*Corpus* and *Animus*—he points out that the former is an act, and that an act implies volition. The 'will' therefore is an ingredient in the element of *Corpus* and not of *Animus*. 'If,' he says, 'the word *Animus* had been translated "Intention" (Absicht) instead of "Will," the Will theory would probably never have attained to such importance in the doctrine of possession.'

Savigny's views have been too often stated to need repetition. His great work will always be valuable to students of the subject, but Ihering's attack has left his main position in ruins, and no German jurist at any rate will venture again seriously to defend it. But when we turn to the question of reconstruction all unanimity is at an end. No theory can boast, as Savigny's for a time cer-

tainly could, of almost universal acceptance; and though Ihering's views have been adopted by several jurists, the dissentients are more numerous and their names, in Germany at least, carry more weight. Were the case, however, tried before an English instead of a foreign Jury, there can be little doubt that the verdict would be the other way.

On page 208 of 'The Common Law' is the following passage:—'Ihering, to be sure a man of genius, took an independent start, and said that possession is ownership on the defensive; and that in favour of the owner he who is exercising ownership in fact (i. e. the possessor) is freed from the necessity of proving title against one who is in an unlawful position. But to this it was well answered by Bruns in his later work, that it assumes the title of disseisors to be generally worse than that of disseisees, which cannot be taken for granted, and which probably is not true in fact.' Mr. Justice Holmes was only indirectly concerned with possession in the civil law, and it would hardly be fair to take this sentence as representing his deliberate summing up of the value of Ihering's contribution to the literature of possession.

Before we can consider the aptness of Bruns' answer, we must first determine what was the question to be answered. Was Ihering discussing the philosophical ground for the protection of possession taken generally, or the grounds on which the legislator ought to protect possession, or, thirdly, was he seeking for the principle on which the Roman Praetor acted when he introduced the possessory interdicts? The first two questions may strike us as merely different forms of the same question, for to an empirical English mind the grounds on which the legislator ought to protect possession may well seem to be identical with the philosophic basis of possessory remedies. But Bruns 'demands an internal juristic necessity drawn from the nature of possession itself, and therefore rejects empirical reasons,' and to him doubtless the two questions are quite distinct. What exactly is meant by the philosophical ground for protection of possession when considered apart from any particular legal system, and independently of any considerations of expediency, it is not easy to understand, nor indeed is the investigation a profitable one: possession in the abstract may be left to the philosopher.

The question whether as a matter of statistics the title of disseisors is generally worse than that of disseisees might be a difficult one to settle, nor has it ever to my knowledge been suggested to the legislator to take the result of such an enquiry as a rule for practical guidance. Bruns says that it cannot be taken for granted, and if law were an exact science like mathematics,

and the legislator a seeker after absolute truth, the objection would have weight. But law is a practical science, and unless the above-mentioned assumption be made, we have as a result, that anything to which one cannot prove one's title may be stolen.

Ihering, however, states most distinctly that it is with the third question alone that his (first) book is concerned, namely,—'Why did the Romans protect the possessor?' and he protests against the introduction of some ideal system into a discussion upon Roman law possession. This being the case, the answer of Bruns is no answer at all, for even if, as he says, it cannot be taken for granted that the title of disseisors is generally worse than that of disseisees, the old Romans may nevertheless have practically made this assumption, and there is every reason to suppose that they did. At the present day, with the inherited traditions of law and order, the result of the regular action of legal tribunals, cases of disseisin are comparatively rare, and it is perhaps true that the disseisor in the majority of cases has a better title than the disseisee. This admission, however, certainly cannot be made in the case of movable property, and for an early period it would be rash to make the assertion with regard even to land. But be this as it may, we know that primitive societies looked at the matter from a totally different point of view: in their eyes ownership and possession are very much the same thing: possession is to them ownership visible. Prof. Maitland in his articles on Seisin has pointed out that the position of a possessing non-owner was often practically better than that of a non-possessing owner of land under our early English procedure. And yet it is certain that the introduction of possessory actions was in the interest of owners, for it is perhaps not too much to say that in ninety-nine cases out of a hundred the actual possessors of property are also the rightful owners.

But if in the general interest of owners possession may be proved instead of, and even in opposition to, title, it must sometimes happen that the *mala fide* possessor reaps the benefit. The same consequence follows in the wake of all useful legislation, as for instance in the case of the legal recognition of negotiable instruments, which certainly increased the opportunities for dishonesty. No one, however, has suggested that they were legalised with this object, yet from the persistence with which the *mala fide* possessor has been thrust into the foreground by so many writers on possession, one might really imagine him to be the cherished object of the legislator's care.

It is just this possibility of the triumph of the *mala fide* possessor

over the real owner, the victory of wrong over right by the aid of legal process, which is to the German mind the riddle of the institution of possession, and the attribution to the early Praetors of a Kantian desire to protect the freedom of the individual will is a desperate attempt towards its solution. The English lawyer has no need to resort to such explanations, for to him this stumbling-block of the philosopher presents no difficulty at all. His training may not have been an ideal one, but at least it has saved him from the common German error of looking upon law as a product of pure reason, and the all-importance of seisin in our early law of property has taught him to regard the wrongful possessor as an inevitable and characteristic feature of a developed possessory system.

A single instance of poverty in the German language has been, in my opinion, a fruitful source of error, when taken in connection with the fact that every lawyer has first saturated himself to a greater or less degree with philosophy. The word *Recht*, like our 'right,' has reference both to a moral and a legal standard, and unfortunately as *objectives* and *subjectives Recht* it does duty both for 'law' and 'a right.' It is surely due to these double meanings that we owe such statements as *Aus Unrecht kann kein Recht erwachsen*—no right can arise from wrong—for if it were so, *das Recht* would be in antagonism with itself. This statement, which is demonstrably false, is found not in a philosophical treatise, but in the writings of a jurist so distinguished as the Austrian Randa. It follows from this position that as the Roman law did protect the *mala fide* possessor, as in fact possession can arise from wrong, then possession cannot be a right, and is merely a fact, though, in Windscheid's words, a fact 'which has legal consequences.'

This much debated question, as to whether possession is a fact or a right, would never have attained to such importance, if before rushing into the fray the combatants had spent a little time and care on the definition of the question over which they were about to fight. The term *possessio* in Roman law, like our possession, is used in several senses. It denotes a certain relation of a person to a thing, and though it is for the law to decide to what particular relation legal consequences shall be annexed, the *existence* of the relation is clearly a matter of fact. But it also denotes an aggregate of legal consequences springing from the fact of possession in the former sense, and the Roman jurists frequently used the term *jus possessionis* to denote the sum of these consequences. The whole discussion was essentially one of words, and its origin, like that of many another, may be traced to the myriads of

philosophic germs with which the air of a German University teems, and which infect the neighbouring lecture-rooms.

With regard to the acquisition and loss of possession, Ihering's case has been admirably stated by Mr. Lightwood, and I agree with him in thinking that the unsoundness of Savigny's positions has been clearly proved by examination of the texts.

But the question now arises—Supposing that Savigny's work does not give a satisfactory explanation of the Roman law of possession, cannot the same be said of Ihering's attempts at reconstruction and of those of every other jurist? Is there in fact any possibility of building from the materials at hand a structure which can withstand the blows of the first critic? German civilians have generally made the mistake of expecting too much from the Roman jurists and legislators. And, again, it has been too often forgotten that Justinian's Digest represents several centuries of juristic work: the names of jurists living at an interval of hundreds of years from one another have been regarded as transposable symbols, and little attempt has been made to trace the historical development of the various institutions. This is perhaps natural, for the alterations of Justinian's compilers were so numerous that the student of the Digest is never quite sure that his authorities have not been tampered with. And, in the second place, we are assured by Justinian himself that there are no real contradictions to be found in his work, and though this statement is not correct, the endeavours of Tribonian and his associates to realise the imperial ideal have certainly led to the suppression of much that would be invaluable from the historical standpoint.

Professor E. J. Bekker[1] has made a most interesting attempt to trace the history of possession in the Roman law, and he has come to the conclusion that certain difficulties, inherent in the subject, were never resolved nor even clearly perceived by the Roman jurists, and that in consequence Justinian's compilers cannot fairly be blamed for their failure to produce a clear and consistent result.

He holds, like Vangerow and Ihering, the opinion that the origin of the possessory interdicts is not to be found in the protection given to the possessors of the *ager publicus*, or to the acquisition of slaves, nor in any of the Praetorian *missiones in possessionem*, but in the protection of a possessor who is bound to defend his title in a real action and is prepared to do so rather than give up possession. Sometimes it was clear who was pos-

[1] Das Recht des Besitzes bei den Römern. Leipzig, 1880.

sessor, but when it was not so, that is when the possession as well as the ownership was in dispute, it was convenient to separate the two questions. It is quite uncertain at what period the question of fact was complicated by the introduction of the question of rightfulness of possession in the form of the *exceptio vitiosae possessionis*, but when the classical jurists took up the subject the law had reached this stage, that protection is given to that party who has the immovable now or has had the movable for the greater part of the past year, provided he did not get it *vi, clam aut precario ab adversario.*

When the *interdicta ret. poss.* were first introduced, the Praetors probably thought the notion conveyed by *possidere* as simple and certain as *apud quem esse.* But with regard to the possession of land, cases must soon have occurred in which the question *uter possessor* was not so easily answered. When the answer to a question, which hitherto has seemed to answer itself, has to be sought from judicial authority, a *res facti* has become a *res juris*, and this was the case with possession[1]. But now that it had ceased to be a mere fact and had become a legal conception, the question arises—How was this conception formulated? The earliest idea of possession was certainly that of a continuing physical relation of a person to a thing. But when possession becomes a *res juris*, a new theory gradually supplants the older one. Possession, like other legal relations, is held to be constituted by a certain act or event: the possessor remains such until another act or event puts him out of possession, but a continuing physical relation is not necessary. The basis for the subsequent confusion was laid by the failure of the Roman jurists to see that the point of view had shifted. For acquisition of possession both *corpus* and *animus* are necessary, but one can retain possession *either corpore or animo*, and in time the requirements for retention take a very vague form, e. g. in the case of the fugitive slave.

When possession ceases to denote merely an actual physical relation of a person to a thing, it comes to mean a right or an

[1] A passage in Professor Maitland's 'Beatitude of Seisin. I' (L. Q. R., Jan. 1888) seems to me to furnish a very interesting illustration of a parallel process in our early English law. Speaking of the working of the newly introduced Assize of Novel Disseisin in the reigns of Richard and John, he says (p. 28), 'But just because it was working well, the records of its working are uninstructive. In case after case there is no pleading at all, and the jurors answer the question put to them with almost monosyllabic brevity—"disseisivit eum," "non disseisivit eum"; they well understand what is meant, and do not pray the aid of the justices. During Henry the Third's reign special pleas (exceptiones) become not very uncommon, and special verdicts become still commoner. The ideas answering to the terms "injuste," "disseisivit," "libero tenemento" are being developed and defined, and it is becoming rather rash for laymen, over whose heads an attaint is pending, to swear that *B* has unjustly disseised *A* of his free tenement. Then from the middle of the thirteenth century we have Bracton's book with an elaborate doctrine about the scope of the assize.'

aggregate of rights pertaining to a person who has once acquired it and has not lost it. This confusion of possession as an actual physical relation and possession as an aggregate of rights constituted by a certain event and continuing until another event, runs right through the subject. A very good illustration may be found in the controversy as to *possessio plurium in solidum*.

We learn from Paulus (41. 2. 3. 5.) that Sabinus was of opinion that in the case of a tenancy at will both the *precario dans* and the *precario accipiens* had possession, and that Trebatius thought that two people could possess the same thing provided the possession of the one were *justa* and of the other *injusta*. Labeo and Paulus reject these views, the line of argument taken by the latter being as follows; *non magis enim eadem possessio apud duos esse potest, quam ut tu stare videaris in eo loco, in quo ego sto, vel in quo ego sedeo, tu sedere videaris.* This view appears to be approved by the compilers, but nevertheless a fragment of Pomponius is given in the Digest, which certainly is in agreement with the opinion expressed by Sabinus. Speaking of a *precarium* of a slave he says (43. 26. 15. 4.), *placet autem penes utrumque esse eum hominem, qui precario datus esset, penes eum qui rogasset, quia possideat corpore, penes dominum, quia non discesserit animo possessione.* And, again, the opinion of Trebatius given above is confirmed by Ulpian (43. 17. 3 pr.), *Si duo possideant in solidum, videamus, quid sit dicendum . . . . . ego possideo ex justa causa, tu vi aut clam: si a me possides, superior sum interdicto, si vero non a me, neuter nostrum vincetur: nam et tu possides et ego.* There are great difficulties about this passage, but one thing is evident (unless we accept Savigny's idea that the final clause of this passage was intended as a *reductio ad absurdum*), namely, that Ulpian saw nothing impossible in *possessio duorum in solidum*.

This difference of opinion between the two contemporaries Ulpian and Paulus on such a point, shows us most plainly that they were arguing from two quite different conceptions of possession. Paulus (41. 2. 3. 5) treats possession as a mere fact, which is as completely independent of the influence of the judge or legislator as are the rules of arithmetic or the state of the weather. He says two people can no more possess the same thing than they can stand on the same spot. Ulpian, on the other hand, is thinking of possession as an aggregate of rights or legal consequences, which is in reality the creation of the legislator and which can be attributed to more persons than one in different degrees. The question with him is not—Is possession by two persons of the same thing physically possible? but—Can the *jus possidendi* be attributed to two people? or in other words—Is the *jus possidendi*, after the model of the *jus dominii*, an exclusive

right, or, like the *jus pignoris*, a non-exclusive one? If the latter, then stronger and weaker rights of possession may be given to two persons over the same thing.

Sir F. Pollock, speaking of the same question with reference to the Common Law, says—'It must be admitted that the language of our authorities is anything but clear and uniform, and sometimes a bailor and bailee are spoken of as both having possession. In such passages the word is used in a double sense [1].' This is just what happened in Roman law, but unfortunately by far the most important place in the Title *de acquirenda vel amittenda possessione* is given to Paulus, who showed more strongly than any jurist the inclination to treat possession as a mere fact, and who appears quite unconscious of the confusion wrought by the double sense of the word. Papinian seems less satisfied with the condition of the doctrine, but he, like Paulus, fails to distinguish between the two meanings of possession. Though Ulpian came nearer to the solution of the problem than either Paulus or Papinian he cannot be said to have solved it, and as the doctrine was left in this unsatisfactory condition by the last of the great jurists, nothing in the way of improvement could be expected from the imperial legislators, nor from Justinian's compilers.

Let us pass on now to another reproach which Mr. Justice Holmes has brought against the Roman law, namely its refusal of possessory remedies to bailees in general. It is in connection with this subject that I wish to speak of Ihering's latest contribution to legal science [2]. The importance of this work reaches far beyond that of the question of possession, for it is, as its second title indicates, an attack on the method of German jurists from Savigny downwards. It is even more than this, for Ihering does not shrink from the attempt to trace the pernicious tendency, as he considers it, up to its source in the writings of the Roman jurists, of whom Paulus is shown to be the chief offender. He chose Possession as the ground on which the seed of error has brought forth its most luxuriant crops, and his work might more correctly be entitled 'The true and the false method in Jurisprudence, as illustrated by the doctrine of Possession.'

The manner in which this question of the denial of possessory remedies to bailees and tenants has been approached by different jurists, is in itself a study in juristic methods. Bruns and the other upholders of the Will theory explain the exclusion of bailees

[1] Possession in the Common Law. Pollock & Wright, p. 21.
[2] Der Besitzwille. Zugleich eine Kritik der herrschenden juristischen Methode. Jena, 1889.

from possession by assuming a deficiency in their will: they accept the rules of the Roman law on this point as 'formulated reason,' and set to work to find a philosophical explanation for them. No one can be a 'true' possessor who recognises the ownership of another; when therefore the modern German law, like every other rational system, gives possessory remedies to the tenant and the bailee, they see in this a sacrifice of 'principle' to convenience. To which Mr. Holmes remarks in words which might be Ihering's, 'I cannot see what is left of a principle which avows itself inconsistent with convenience and the actual course of legislation. The first call of a theory of law is that it should fit the facts [1].'

If the Roman law of possession had come down to us in as fragmentary a condition as the XII Tables, and the German jurists were therefore free to indulge their taste for reconstruction, they might have given us a logical doctrine, though it would to a certainty have hopelessly broken down in practice. But there are those awkward cases of the pledge-creditor, the *emphyteuta*, the *sequester* and the *precario tenens* (to say nothing of more doubtful ones) to be explained, and the attempt to make them agree with preconceived theories has caused much difficulty. The Romans, with an indifference to the nature of 'true' possession, which is excusable as the Germans had not yet discovered it, gave them possessory remedies, although as they recognised the *dominium* of another, they certainly had not the *animus domini*. Savigny, as every one knows, set up for them the category of 'derivative possession,' which is nothing more than a collective term for the cases which his theory failed to explain [2]. He admits in short that they are anomalous and suggests the explanation of 'historical reasons.' But, as both Bekker and Ihering point out, there is no ground for assuming that the Romans regarded these cases as anomalous. The extension of an existing remedy on the ground of analogy was of very frequent occurrence, and the Roman jurists well understood the nature of these extensions and marked the remedies in question with appropriate names. Now in the cases of so-called 'derivative possession' there is no trace of any such distinction, and the only ground therefore for treating them as anomalous is their failure to fit into Savigny's theory. If the *animus domini* were presented as merely a rule admitting exceptions, it might still survive, though with a diminished lustre, but it is asserted to be essential to the very nature of possession [3], and we are

[1] Holmes, Common Law, p. 211.

[2] Savigny is generally regarded as the originator of the theory of *animus domini*, and of 'derivative possession'; but Dr. Goldschmidt has pointed out that the former theory, in the identical form in which it appears in Savigny's work, is as old as Donellus, while 'derivative possession' may be traced to Lauterbach, a German jurist of the last century. Ihering, Besitzwille, pp. 246–252.

[3] Savigny, Besitz, 109, 110.

therefore only left the choice between sacrificing it and throwing over the Roman law. And from this latter course some jurists have not shrunk. Puchta, a Roman lawyer himself be it noted, and not a professor of 'Naturrecht,' apparently considered possession and detention as conceptions existing from all time distinct from one another. The cases of derivative possession ought to have been detention, but an arbitrary jurisprudence decided otherwise. Puchta's objection to this classification is not, it need hardly be said, based on practical considerations: these are beneath the notice of the ideal jurist. According to the doctrine of possession written in the stars, the *animus domini* is essential, it is the soul which inhabits the *corpus possessionis*; if the Roman law gave possession in cases where this *animus* was wanting, so much the worse for the Roman law. Let the pledge-creditor, the *emphyteuta* and the rest, enjoy the practical advantages and even bear the name of possessors, they are not possessors in the true sense of the word for all that.

Bruns also is convinced that it belongs to the *innere Nothwendigkeit* of possession, to the eternal fitness of things in fact, that no one can really have possession who has not the *animus domini*[1].

We seem to be listening to an echo of the Naturrecht of the eighteenth century, for this is a possession which never was on land or sea: its dwelling-place is that abstract region 'wo die reinen Formen wohnen'; its creator is one who draws his legal principles not from actual life, but by logical deduction from premises of his own; the source of law in his sense is not the market-place and the law-court, but the study of the Professor. If we may judge a tree by its fruit, there must be a defect somewhere in the methods of the German historical school, for Puchta and Bruns are justly classed among its ablest representatives.

Savigny himself seldom forgot, as many of his disciples do, that his purpose was to expound the Roman law, and not to lay down principles with which that law must conform at peril of professorial censure; but his attempt to save the *animus domini* by means of 'derivative possession' is like the act of a man who having sent out an unseaworthy ship of his own making, sends out with it a leaky boat in case of accidents.

But though Savigny to the last clung to the *animus domini*, the impossibility of making it square with the facts of Roman law is more and more generally recognised, and the *animus possidendi*, defined as the intent to exercise exclusive control over the thing for oneself, substituted for it. This is an improvement on Savigny's view, for it takes away the anomalous character of the instances of so-called derivative possession, but what in Ihering's

[1] Bruns, Recht des Besitzes, u. s. w., 463-471.

opinion is the fundamental mistake of assuming any specific intent for possession distinct from that required for detention still remains.

Why had the *emphyteuta* and the pledge-creditor the possessory interdicts, whereas the tenant for years and the hirer had them not? The usual answer given is, that the former had the *animus domini* or *animus possidendi*, while the latter had not the intent to possess for themselves, but for another. Ihering, on the other hand, declares that the intent of the parties has nothing whatever to do with the distinction; that the intent which is a necessary constituent of every legal act, is the same in the case of both possessor and detentor. Wherever the fact of possession exists there is legal possession, unless a rule of law exceptionally enacts that there shall be only detention. The 'Besitzwille' or *animus possidendi* never comes into question in the decision of an actual case, and a *judex* might therefore apply the Roman law of possession correctly without knowing anything about the theories of the will. On Ihering's theory the task of the *judex* is simple: his instructions are—assume legal possession wherever the fact of possession exists, unless one of the *causae detentionis*, which you will find enumerated in any treatise on the Pandects, is proved. The *causae detentionis* are positive rules of law, based in all cases on practical utility. They are objective rules, that is to say, they rest on considerations outside the person of the *detentor*, and not, as the prevalent doctrine teaches, on some deficiency in his will.

The impossibility of distinguishing between possession and detention, if the *animus* be taken as the test, may be shown by an example. Let us take the agent and *tutor*, and, on the other hand, the tenant. The two former, according to the Will theory, should have merely *detentio*, as they intend to possess for another; the latter should have possession, as he intends to possess for himself: the jurist of the Augustan age would, however, have given possession to the two former and detention to the latter. The conclusion Ihering draws is that, it being impossible to deduce logically the distinction between them, we must seek the explanation from history.

He finds the origin of *detentio* or *possessio naturalis* in the relation of those under power to the *paterfamilias*. A *filiusfamilias* in early Roman law could not be an owner, nor could he bring actions: he could not, therefore, be legally a possessor. But the institution of *peculium* was a very general one in the case of sons of full age. In rich families the sons had frequently very large independent establishments of their own, with country estates and numerous slaves, while among the trading classes they often had a separate

business capital. In law they were neither owners nor possessors; but they were in actual possession of their *peculium*, and just as their contractual relations with their parents were termed *obligationes naturales*, so their possession of their *peculium* was *possessio naturalis*.

The earliest instance of *detentio* outside the family is probably that of the tenant. The position of the tenant was very different in the earlier and in the later law: he had no possessory remedies, and it is extremely likely that there was a period in which he had no remedy at all against ejectment by the *dominus*. The check on the arbitrary action of the landlord, like that on the power of the father, was at that time a moral one, but, as the law was in early times made entirely by the landlord class, this is certainly not so remarkable a phenomenon as the late survival of the paternal power. We know that a Roman landowner superintended his tenants very much as a farmer looks after his labourers. If the tenant was a good one, it was to the interest of the landlord to keep him, and in fact tenant families remained for generations on the same land. If he was a bad tenant, he must go: the early Roman law had little toleration for bad farming. In point of fact, a tenant without an action was no more defenceless than a son or a wife, for in a state where public favour was the avenue to all offices and distinctions, the importance of a good reputation and the direct influence of the censor, were more effectual than any action for damages. The relations of landlord and tenant as to lodgings in Rome must early have become important, for the price of land in and about the city must have made it impossible for the poorer artisans and labourers to live in houses of their own.

For the extension of the idea of detention to movables there seem no imperative reasons of convenience, and it may perhaps be ascribed to the action of legal science on the ground of logical consistency.

It was not until the second century, A. D., that possession could be acquired for one directly by a free agent, but with this rule detention attained to its fullest development, as a means not only of retaining but of acquiring possession for another.

In all this there is no hint of the theory that the nature of the possessory relation depends upon the intent of the person in possession: the history of agency, in fact, supplies us with a direct argument against it, for in spite of the fact that the agent acting under a mandate has no intent to possess for himself, but for another, it was not until the second century, A. D., that that other acquired possession, the agent having only detention; and the change was most certainly due to no sudden illumination as to the

defective *animus* of the agent, but simply to the fact that the inconvenience of the old civil law rule had at last become too manifest for the jurists to disregard.

Having tried the subjective theory, as he terms it, by the historical test, Ihering next submits it to the test of procedure, a test from which its supporters refrained. He supposes a *judex* instructed to decide for possession if the *animus domini* is proved: for detention if it is not. A tenant comes before him, and is asked whether he has the intent to act as an owner acts. So far as he understands the question, he certainly has, so long as his lease lasts. But if he is a tenant for years, he cannot have this intent, though a tenant at will or a perpetual tenant may. Why, then, is the question asked as to his intent, if the law lays down that certain classes cannot have a particular intent? The question should rather be as to the *causa possessionis*. This would simplify the matter so far as the *judex* is concerned, but it would still impose a great burden on the party. As to how many of the movables at present in our possession could we prove the *causa possessionis*?

The 'subjective' theory in either form is unpractical in its working. Ihering substitutes for it the simple rule—Detention is taken to be possession until one of the *causae* excluding possession is proved. The Romans, with their practical tact, adopted this principle of the division of the necessary facts of evidence into positive and negative—*Probatio traditae vel non traditae possessionis non tam in jure quam in facto consistit ideoque sufficit, si rem corporaliter teneam*, Paulus, Sent. Rec. v. 11. 2. This shows clearly that the fact of possession alone need be proved: it is for the opponent to prove that some actual rule of law reduces the apparent possession to detention[1].

Ihering next applies the legislative test, and points out that if the legislator were to establish Savigny's principle, that the nature of the possessory relation depends on the will of the individual in possession, then an agent or a tenant might make themselves possessors, and the whole law of agency and of landlord and tenant would be at the mercy of the individual. If we substitute for the will of the particular individual, the typical will of a tenant, borrower, &c., and say that such people cannot have the intent to possess, we substitute the *causa possessionis* for the *animus*, and except in regard to the question of evidence, we arrive at much the same practical result as on Ihering's theory.

[1] The French code adopts the theoretically different, though in practice identical, mode of setting up a presumption: *On est toujours présumé posséder pour soi et à titre de propriétaire, s'il n'est prouvé qu'on a commencé à posséder pour un autre.* This implies, it is true, that the *animus domini* is necessary, but the presumption renders this requirement harmless in practice.

In applying the next test—the didactic—Ihering has an easy task, for in the various German text-books which adopt Savigny's theory or some modification of it, confusion reigns supreme, and the inference is strong that the *animus domini* does not give a satisfactory solution of the possessory problem.

Ihering then proceeds to trace the 'subjective' theory to its source in two passages of Paulus, which he declares to be its only certain foundations[1]. In these passages Paulus denies possession to the agent and tenant because they have not the *animus possidentis*. The compilers of the Basilika gave the rule without Paulus' reason, and although we cannot of course infer from this that they disapproved of the reason, or had found it confusing in practice, the omission is worthy of note.

It should be observed in the first place, that this is an individual opinion of Paulus, there being no certain trace of it in any other jurist. And secondly, it has not the importance of a legal principle, but at best of an *obiter dictum*: it is nothing more than a theoretical construction, that is an attempt to give a reason for an unquestioned rule of law. We know that the reasons given by Roman jurists for excellent rules are often as absurd as their etymologies, so that these passages alone form a dangerous foundation for so imposing a structure as that which Savigny has built.

Ihering gives a number of instances of unsuccessful attempts of Paulus in the way of theoretical construction, to illustrate the danger of arguing from his reasons for rules as if they were the rules themselves. The *lex Scribonia* abolished the usucapion of servitudes for practical reasons. We may be quite sure that the *populus* was not called together to pass a *lex* merely in order to make the law more logical; but this is the explanation which Paulus gives, for he declares the usucapion of servitudes to be juristically impossible, *quia tales sunt . . . ut non habeant certam continuamque possessionem*, 8. 1. 14 pr. The absurdity of this argument is obvious. How could it be impossible as it had formerly been the rule? And what about urban servitudes? Is there not *continua possessio* there? Paulus seems to admit that his reason does not apply to them, but he leaves it standing nevertheless.

Again, as to the rule that possession continues in spite of the madness of the agent, Papinian (41. 3. 44. 6) gives the right reason, namely practical utility ('ne languor animi .... damnum in bonis afferat'). Paulus (41. 3. 41. 3) says that as possession is continued when the agent is asleep (!), so it is when he goes mad.

Many other instances might be given of this unfortunate tendency to explain rules introduced from motives of utility by some

[1] D. 41. 2. 1. 20 and 13. 7. 37.

mistaken process of juristic logic. The one which has perhaps caused the greatest trouble is his dictum as to the necessity of *in contrarium actum*, both in regard to *corpus* and *animus* for loss of possession (50. 17. 153); but this was so clearly contrary to the true rule that jurists have agreed to explain it away or neglect it, and Pininski's description of this passage as an 'empty phrase' does it full justice[1].

How did it occur to Paulus to find the distinction between possession and detention in the *animus* of the party? Ihering traces it to a confusion between an act and its consequences. The will is directed toward the act itself and not necessarily towards its legal consequences: they are the direct result of legal enactment and are independent of the will. The tenant in Roman law has detention merely, whether he knows and wills it or not, but Paulus, not content with referring the contract to his will, wrongly refers to it also one of the legal consequences, namely detention. Would he also have made the liability to pay the rent depend upon the will of the tenant?

His argument in 41. 2. 1. 20 is equally unsound. He is distinguishing between direct and indirect agents: the latter acquire possession for themselves, the former (*si nostro nomine accipiunt*) for the principal. This was not allowed under the Republic, and even Javolenus, in the early empire, declares it impossible that one can acquire possession directly through a person not in one's own power. This result, which Javolenus considers impossible, Paulus tries in this passage to show to be logically necessary, although elsewhere (Sent. Rec. v. 22) he admits that it is *utilitatis causa receptum*. The transferor, he says, possesses no longer, but the agent does not possess because he has not the *animus possidentis*, therefore the principal must have possession. But there is another alternative, namely, that no one has possession[2].

The weak point of Paulus' position (as in 13. 7. 37) with respect to the tenant is the reference of the different legal consequences of possession and detention to the will of the agent. Before the recognition by the law of direct agency, no intent whatever on the part of the agent could give his principal possession: after its recognition the possession of the principal depended just as little as before on the *animus* of the agent, for in 39. 5. 13, where property was delivered to an agent for his principal, the agent having the intent to acquire for himself, Ulpian says that he acquires nevertheless for the principal.

[1] Pininski, Der Thatbestand des Sachbesitzerwerbes p. 156, quoted by Ihering.

[2] See 41. 2. 18. 1: *Si furioso, quem suae mentis esse existimas . . . rem tradideris, licet ille non erit adeptus possessionem, tu possidere desinis.*

It is a fundamental mistake of the subjective theory to assume that the intent to hold for another is inconsistent with one's own possession either according to Roman law or logic.

In the place of the *animus domini* or *animus possidendi* as the ground of the distinction between possession and detention, Ihering asserts that practical considerations determined the nature of the possessory relation, and in order to prove this he examines carefully the various cases in which possessory remedies were given or refused, treating them not as mere legal entities but as living Roman institutions. By means of his unrivalled power of making dry bones live, he makes us understand why the *emphyteuta* and *sequester* had possession while the *colonus* and the ordinary depositary had it not: he examines with the same thoroughness and insight the difficult cases of the *precario tenens*, the *superficiarius* and the *negotiorum gestor*, and with every example he leaves us more firmly convinced that the secrets of Roman law are not to be discovered by logical deduction from *obiter dicta* of the jurists, but by realising as fully as our knowledge permits the actual facts of Roman life.

But to discuss these points would make this paper too long, and his final chapters, containing an interesting sketch of the history of possession in the middle ages and in modern times, and a criticism of the sections devoted to the subject in the draft of the new German Code, must also be passed by.

Although Ihering's two most important works—'Der Geist des römischen Rechts' and 'Der Zweck im Recht'—are still unfinished, and the former will, it is to be feared, remain so, this last book of his, 'Der Besitzwille,' in a certain sense completes the work of the last twenty-five years of his life. In 'Der Zweck im Recht' he developes the principle that all legal and moral rules are determined by practical interests—'Der Zweck ist der Schöpfer des ganzen Rechts'—; in 'Der Besitzwille' he takes possession as a definite branch of the law on which to prove the truth of this principle and at the same time to point out the error of the purely logical treatment of law which has so long prevailed in Germany.

It is almost impossible for an Englishman unfamiliar with the legal literature of Germany to understand the revolution in ideas which must take place before this proposition, which may seem to many a self-evident one, could be accepted in that country.

The truth no doubt lies somewhere between Ihering and the jurists whom he criticises, for although the broad outlines of every legal system are determined by practical interests, there are hundreds of rules the immediate source of which is juristic logic and not any practical motive, though the two frequently coincide. It cannot be doubted that much of what Savigny terms the

'technical' as distinguished from the 'popular' element in law has been the work of jurists in whose eyes law-making, whether disguised or not as 'interpretation,' is a purely intellectual process. How many rules which conflict with sound principles of legislation has not our law owed to the scholastic subtleties of Coke. The presence in the draft German Code of the ghost of the *animus domini*, presiding as it were over the very rules which have destroyed its real existence, shows that even in the stronghold of the practical, the modern code, 'Die Vernunft im Recht' (so-called), is still keeping up the struggle against the all-pervading 'Zweck.'

But no one can read any of Ihering's later writings without recognising their great value, especially to those of us who are strangers to law in its practical aspects, and are therefore prone to take a purely intellectual view of its rules and principles.

It is interesting to compare the different manner in which the cases so often mentioned, of the *emphyteuta*, pledge-creditor, *precario tenens*, &c. are treated by Prof. Bekker, whose standpoint is notwithstanding much nearer to Ihering's than to that of Bruns. He discusses at some length the question whether they had true possession like an owner, or *quasi-* or *juris possessio* like one having a right of way or of usufruct, and he decides for the latter, though the utterances of the jurists are anything but clear and uniform. The question is, after all, only of dogmatic interest, and I cannot help thinking, in spite of Prof. Bekker's arguments, that this want of clearness arises from the fact that the Romans were not much more interested in the matter than Ihering, who dismisses it in a sentence. The important point was and is that they had possessory remedies: whether the jurists explained these remedies on the analogy of *rei possessio* or of *juris possessio* is of comparatively little moment.

Mr. Justice Holmes makes by implication another reproach against the Roman law, which certainly seems to have less foundation than the one relating to their refusal of possessory remedies to bailees. He says (p. 210), 'the English law has always had the good sense to allow title to be set up in defence to a possessory action [1].'

The exclusion of the question of title is treated by Ihering and by continental jurists generally as an essential feature in a true possessory system of remedies and surely with justice. Mr. Holmes goes on to say, 'The rule that you cannot go into title in a possessory action presupposes great difficulty in the proof, the *probatio diabolica* of the Canon law, delays in the process, and importance of possession *ad interim*—all of which mark a stage of society which has long been

[1] Professor Maitland ('The Beatitude of Seisin. I,' L. Q. R., Jan. 1888) has shown that this statement is not correct: the English law of Bracton's time and still later did not allow the plea of title in possessory actions.

passed. In ninety-nine cases out of a hundred it is about as easy and cheap to prove at least a *prima facie* title as it is to prove possession.' That is to say—the exclusion of the question of title is expedient in early stages of society: it is only a mistake now, because it is almost as easy to prove title as to prove possession, or in other words, because the value of possessory remedies is a thing of the past. The reason for the exclusion of pleas of title was this very simplification of proof and procedure, and there was ample justification for it at a certain period both in the English and Roman systems.

Possession as an 'outwork' of ownership has an ever lessening value as society becomes more settled and methods of proof become more rational, and 'a time comes when title, if it exists, can be easily proved, and ownership no longer requires the protection of an outwork so clumsily constructed that it can be turned into a besieging battery by the thief or land-grabber.'

Other defects in the Roman law of possession might be pointed out, but to discuss them would take us too much into detail.

To sum up briefly the results of the foregoing pages—Bekker seems to me to have shown that it is impossible to prevent a perfectly consistent *doctrine* of possession owing to the failure of the Roman jurists themselves to clearly comprehend and define the questions which the introduction of the possessory interdicts by the Praetors set before them. It was too much to expect that Tribonian should have succeeded where Papinian and Ulpian failed, and the compilers increased instead of diminishing the confusion.

But the Romans were as strong in their practical casuistic work as they were weak in theory and definition, and from the cases given in the Digest a good working law of possession can be extracted, though we find, as in the English law, differences of opinion among the jurists on particular points. There is abundant evidence that the Romans regarded possession as a right, and a right of the proprietary and not of the personal kind.

Of the various attempts to explain the Roman law of possession with which I am acquainted, Ihering's seems to me by far the most satisfactory. *Omnia ut dominum gessisse*, which may be taken as the text of his first work on possession, is, says Sir F. Pollock, 'for English as well as for Roman lawyers a good working synonym of *in possessione esse*.' It certainly clears up difficulties in the Digest which seem inexplicable on any other theory, notably those passages which require *diligentia* on the part of the possessor.

Of his last work, which is concerned with the other element of possession, the *animus*, enough has already been said.

The benefit of the argument from analogy may, I think, also be claimed on behalf of his views. Ihering has in his other works re-

marked on the great similarity of the Roman and English characters as seen in the development of their legal systems. It may be said without fear of contradiction, that his is the only German theory of possession in which an English lawyer would recognise the principles which underlie our own Common Law. This similarity is nowhere more striking than in the branch of law we have been considering, for side by side with weakness in definition and doctrine, the Roman law of possession displays all that casuistic skill, united with practical good sense, which has made almost possible the hopeless task of continental legislators to adapt the law of the first five centuries to the civilization of the nineteenth.

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NOTES ON THE ALIENATION OF ESTATES TAIL.

IT is commonly thought that a tenant in tail could not, before the invention of common recoveries, create any estate which was not liable to be defeated by the issue in tail. It is commonly believed that common recoveries took their origin in the decision in *Taltarum's* case, 12 Ed. IV, 19 pl. 25 (1472). I shall endeavour to show that both these opinions are, in all probability, erroneous. I shall endeavour to prove that a tenant in tail could in many cases, with the concurrence of a relative, create an estate which was not liable to be defeated by the issue in tail, and which was either an estate in fee simple absolute, or a fee simple determinable, or a base fee according to the circumstances, and that common recoveries were in use long before *Taltarum's* case was decided.

The only form of settlement now known to have existed before the Statute De Donis was a fee simple conditional, the simplest form of which was a gift 'to *A* and the heirs of his body.' The effect of a gift in this form is discussed at some length and with much clearness by Mr. Challis in his 'Treatise on the Law of Real Property,' chap. xviii. For the present purpose it suffices to say that (1) alienation by the donee, after the birth of an heir of the prescribed class, conferred on the alienee an estate in fee simple absolute; (2) alienation by the donee, before the birth of an heir of the prescribed class, conferred on the alienee an estate in fee simple determinable on the failure of such heirs, but did not bar the donor of his possibility of reverter; (3) if no alienation was made, the land reverted to the donor on failure of heirs of the prescribed class; (4) where the gift was to *A* and the heirs of his body by *B*, or to *A* and *B* and the heirs of their bodies, and *A* and *B* were husband and wife or persons who might marry, and an heir of the prescribed class was born, the land might descend to the heirs of the donee, or of the survivor of the donees, by a subsequent marriage. It appears, contrary to the common opinion, from the researches of Professor Maitland, *ante*, p. 22, that settlements made before the Statute De Donis containing limitations in the form following, 'To *A* and the heirs of his body and in default of such issue to *B* and the heirs of his body,' were not uncommon.

The Statute of Westminster the Second, 13 Ed. I, c. 1, commonly called the Statute De Donis (1284), provided that neither the

donee nor his heirs of the prescribed class, should have power to alienate the land so as to defeat the issue of the donee or the reverter to the donor or his heirs; and that where the gift was to *A* and the heirs of his body by *B*, or to *A* and *B* and the heirs of their bodies, and *A* and *B* were husband and wife or persons who might marry, the heirs of the body of the donee by an after-taken husband or wife should take nothing. An estate limited by words which before the statute would have conferred a fee simple conditional, was, if created after the statute, called an estate tail.

The statute, it will be observed, was intended to prevent alienation by the tenant in tail from defeating the issue in tail or the reverter to the donor; it was not intended, and this (it will be seen) is a matter of some importance, to protect a remainderman against alienation by the tenant in tail or to protect the issue in tail from the act of a stranger.

In order to see in what manner it was possible, notwithstanding the Statute De Donis, for a tenant in tail prior to the Statutes of Fines, 4 Hen. VII, c. 24, and 32 Hen. VIII, c. 36, to make a conveyance having the effect of barring the issue or even the owner of the reversion in fee, it will be necessary to discuss the doctrine of warranty.

The learning as to warranties is perhaps the most difficult branch of our law, and it is with much hesitation that I advance the following considerations. The authorities are collected in Co. Lit. 364 b, *et seq.*; Shep. Touch. 181 *et seq.*; *Bole* v. *Horton*, Vaugh. 360; I. Preston, On Abstracts, 409.

A warranty was 'a covenant real annexed to lands and tenements whereby a man and his heirs are bound to warrant the same, and either upon voucher or by judgment in a writ of *warrantia cartae* to yield other lands and tenements to the value of those that shall be evicted by a former title, or else it may be used by way of rebutter. Warranties are either express, i. e. made by deed or implied by law.' Co. Lit. 365 a. I shall only consider warranties of the former class.

The effects of voucher and rebutter were very different. If a real action was brought to recover the land from a tenant entitled to the benefit of a warranty, he could vouch the warrantor or his heir; or, in other words, could call upon him to defend the title, and on his default could recover from him lands of equal value to those which he lost in the action. On the other hand, rebutter was where the person who brought a real action to recover land was the person who was bound to warrant the same land to the tenant, and in this case by pleading the warranty the tenant could stop the action.

Where, after the Statute of Quia Emptores, a tenant in fee simple conveyed the entire fee to another with warranty, his warranty could only have the first effect, that of enabling the purchaser to call on the vendor or his heirs to defend the title against the claims of a stranger: the occasion of using it by way of rebutter could not arise, as the heir of the vendor could have no right on which to found an action for the recovery of the land from the purchaser. On the other hand, where a person having less than the fee simple conveyed the entire fee, as he could by means of a feoffment, the warranty might have both effects; the feoffee might, in an action by a person claiming by title paramount, or by the person who became entitled to the land on the death of the feoffor, vouch the warrantor or his heir, and if the person bringing the action happened to be the heir of the warrantor the feoffee might also use the warranty by way of rebutter.

In Littleton's time the warranty of the tenant in tail bound the issue in tail who happened to be his heir if, and only if, assets descended, and to the amount of such assets; but there was nothing to prevent the warranty of a collateral ancestor which descended on the issue in tail from having its full effect, whether assets descended or not.

No warranty was, however, a bar to an estate which was not discontinued before or at the time when the warranty was made. The word 'discontinued' requires some explanation. The word properly means the turning of an estate into a right of action, as distinguished from 'divest,' which, properly, means turning an estate into a right of entry. It should perhaps be noticed that 'discontinue' is sometimes used incorrectly for 'divest.' When a tenant in tail made a feoffment not creating an estate for life only, he passed the fee simple, the estate tail was discontinued, and the only remedy of the issue in tail, the remainderman or the reversioner, was by bringing a real action, commonly an action of formedon.

The practical result was that if, in Littleton's time, a tenant in tail who was the eldest of his brothers made a feoffment, and one of his younger brothers released to the feoffee with warranty and died without issue in the lifetime of the tenant in tail, so that the tenant in tail and his issue were his heirs, the warranty of the younger brother always descended on the person who would have been tenant in tail in possession if the feoffment had not been made, and could always be used by the feoffee and those claiming under him by way of rebutter. Where the estate was in tail male, it might happen that the heir general of the body of the tenant in tail, who was necessarily the heir of the warrantor, was

a female, in which case the issue in tail male was no longer bound by the warranty, because it did not descend on him, and he could recover the land. In this case the estate acquired by the feoffee was of a very peculiar nature: it was an estate in fee simple determinable as soon as the heir general of the body and the heir male of the body of the tenant in tail were not the same person. It should also be observed that the warranty of the younger brother did not, if the estate in tail or in tail male had been given to his father or any more remote ancestor so that he and his brothers were issue in tail, rebut his younger brothers and their issue in tail, as this seems to have been considered contrary to the statute.

The discussion of warranties in Co. Lit. at 364 *et seq.*, is perhaps somewhat obscured by his celebrated division of warranties into lineal and collateral. Lineal warranty is where the warranty devolves on the person to whom the right to the land passes as heir of the warrantor, so that he has the right to the land as heir and is the heir on whom the warranty descends. Warranty may be lineal notwithstanding that it devolves on a collateral heir. Thus, to take an example given by Mr. Preston, if an elder brother tenant in tail discontinue with warranty, and die leaving his younger brother his heir at law and also the heir in tail, the warranty is lineal.

A collateral warranty is a warranty collateral to the title to the land, and is where a man has a right to the land in a different character to that under which the warranty descends on him. For example, if an elder brother tenant in tail discontinue with warranty, and die, leaving his brother his heir at law and also remainderman in tail, the warranty is collateral, because the brother is bound to the warranty as heir, while he takes the land as purchaser.

The distinction between lineal and collateral warranties is made clear by the examples given by Littleton, ss. 716, 718. If a man has three sons and gives land to them successively in tail, and the eldest discontinue with warranty, and dies without issue, the warranty is collateral to his brothers who are therefore barred. If either of the sons are disseised, and the father releases with warranty to the disseisor, this is a collateral warranty to the son on whom the warranty descends. Again, if a father gives lands to his sons successively in tail male, and the eldest discontinue with warranty, and dies, leaving female issue only, the warranty does not descend on his brother and he is not barred.

There is another curious example in Lit. s. 708: tenant in tail has three sons, and discontinues, the middle son releases to the

discontinuee with warranty, the tenant in tail dies, and the middle son dies without issue; the eldest son cannot recover by formedon, because of the collateral warranty of the middle son which descends on him; but if the eldest son dies without issue the youngest can recover, for the warranty of the middle son is lineal to him, 'for that it might be that by possibility the middle might be seised by force of the tail after the death of his eldest brother, and then the younger brother might convey his title of descent by the middle brother.'

In considering the use that could be made of collateral warranty, it must be remembered that before the Reformation a man who entered into religion and was professed could afterwards have no legitimate issue. If, therefore, a tenant in tail discontinued, and his next brother, being a bachelor, released to the discontinuee with warranty, and afterwards entered into religion and was professed, the discontinuee could not be disturbed as long as the tenant in tail had heirs of his body. 'When a man entreth in to religion and is professed he is dead in the law, and his son or next cousin incontinent shall inherit him as well as though he were dead indeed,' Lit. s. 200; and the heir was entitled to a Mortdauncestor, Fitz. N. B. 196.

It is impossible, in the absence of authority, to say at what time the practice of taking conveyances from tenants in tail with collateral warranty commenced. It is certain that lawyers were familiar with the doctrine of warranty at the time when the Statute De Donis was passed. That statute was passed only nine years after the Statute De Bigamis, and seven years after the Statute of Gloucester, the former of which statutes contains (cap. 6) provisions as to the effect of the word 'dedi' in creating a warranty, and the latter of which contains provisions preventing the warranty of the husband without assets from barring the heir of the wife, a warranty which, it will be observed, was collateral. The Statute of Westminster the Second itself contains provisions as to warranties, see cap. 6.

In Y. B. 20 Ed. I, Rec. Pub. 302, it was decided that lineal warranty without assets did not bar the issue in tail. In Y. B. 4 Ed. II. 115, collateral warranty was pleaded against an action brought by issue in tail, but, owing to the death of one of the parties, no decision was given. In a case stated Co. Lit. 373 b, and in *Sym's* case, 8 Rep. at 51, collateral warranty barred the issue in tail. It might be thought from the marginal references in Coke, Fitz. N. B. Garr. 78, and *Sym's* case, 8 Rep. at 51, that this case happened in 5 Ed. II. But this is not the case. The case mentioned in these references was a *cui in vitâ* as stated in

Fitzherbert, or a *sur cui in vitâ* as stated in 8 Rep., neither of which writs could be sued out by the heir in tail. See also Y. B. 11 Ed. II, 343, Y. B. 19 Ed. II, 672, and other cases cited in *Sym's* case, 8 Rep. 51, and *Fulmerston* v. *Steward*, Plow. at 110. It appears from these cases that collateral warranty was employed shortly after the Statute De Donis was passed, for the purpose of barring estates tail, but we do not know the date of the decision which showed that the practice was correct.

It is sometimes stated that alienation by a tenant in tail with lineal warranty bars the issue in tail if there are assets, but not otherwise. The rule as thus stated requires some qualification. 'If tenant in tail aliens with warranty, and leaves assets to descend, it is a bar to the issue by reason of the warranty and assets descended; but neither the warranty without the assets, nor the warranty and assets without judgment in a formedon shall bar the estate tail; for if the issue (without judgment given) aliens the assets, his issue shall recover the land in tail; but after judgment given that he shall be barred in formedon the issue in tail shall also be barred,' *Mary Portington's* case, 10 Rep. at 38 a.

There is another manner of looking at the doctrine of warranties, see *per* Vaughan J., *Bole* v. *Horton*, Vaugh. at 365. At common law every warranty bound the heir with or without assets. Certain warranties are restrained by statute from having this effect, as for instance, the warranty of the tenant by the curtesy, the warranty of the tenant in tail, though the one is necessarily collateral, the other lineal. By the Statute of Gloucester, which was directed against the warranty of the tenant by the curtesy, it was provided that it should bar with assets, and by the equity of the statute the Courts held that the warranty of the tenant in tail should bar with assets; leaving the warranty of any person who was not tenant in tail to have its effect by way of rebutter, though the person on whom the warranty fell happened to be the tenant in tail.

At common law, if a man brought an action to recover land against a freehold tenant and succeeded even by collusion, as for instance, by his pleading to the action and afterwards making default, the judgment was conclusive against all persons. The artifice of bringing an action against the tenant and recovering the land in collusion with him by his making default, was used with success to enable the tenant to convey the land free from a term, to enable a husband to convey his wife's land, or to convey his own land free from her dower, and to evade the law of mortmain. See the Statutes of Gloucester, c. xi, Westminster 2nd. cc. iii, iv, and xxxii. This artifice was apparently ineffectual to enable the tenant in tail to convey the land free from the rights of the issue in tail, or

of the reversioner, as they were both within the protection of the Statute De Donis, and were enabled to recover by a formedon. It is, however, to say the least, doubtful whether the protection given by the statute extended to a remainderman.

At length, a form of collusive action, afterwards known as a common recovery, was devised, which enabled the tenant in tail to bar the issue in tail, the remainderman in tail, and the reversioner. The validity of this action depended upon the effect of warranty when used by way of voucher.

If *A* conveyed land to *B* in fee simple or fee tail with warranty, and an action to recover the land was brought against *B*, he could vouch *A* or his heirs, i.e. call upon them to defend the title to the land, and if *B* or his heirs lost the land owing to *A* or his heirs failing to defend the title with success, *B* had judgment to recover land of the same value from *A* or his heirs.

In the simplest form of a recovery used for the purpose of barring an estate tail, *A* brought an action to recover the land against *B*, the tenant in tail in possession, *B* vouched *C*, who took upon himself to defend the land, thereupon the action was carried on against *C*, the latter allowed judgment to go by default, and judgment was given that *A* should recover the land from *B*, and that *B* should recover land of the same value from *C*, such land to be subject to the same limitations as those to which the land that *B* had lost was subject. As *C* was always a man of straw, in later days the crier of the Court, the remedy against him was of no value.

A recovery of this nature was called a recovery with single voucher. It barred the estate tail of *B* and all estates subsequent in order of limitation. It could not bar any estate prior to the estate of *B*, because if such estate existed in possession, *B* would not have been in possession, and therefore would not have been the person against whom the action could be brought; and if such estate had been discontinued, *C*'s warranty, which only went to defend the title that *B* himself could defend, i.e. the title to the estate of which *B* was seised in possession, would not have extended to the estate that had been discontinued.

In order to bar estates tail that had been discontinued recovery with double voucher was invented. The simplest form of this proceeding took the form following. *A*, the tenant in tail, conveyed the land to *B*, a person called the tenant to the praecipe, *C* brought an action to recover the land from *B*, *B* vouched *A*, and *A* vouched the common vouchee. In this case the recompense in value from the common vouchee was held to extend to every estate, whether discontinued or not, to which *A* was then entitled. It is

perhaps not very easy to ascertain by what chain of reasoning the Court decided this to be the case, but so it was.

It is often said that common recoveries were first made use of after the decision in *Taltarum's* case, 12 Ed. IV, 11 pl. 25 (1472), discussed and explained Challis, R. P. 250; but this is contrary to the positive assertions of Coke (Co. Lit. 361 b, *Mary Portington's* case, 10 Rep. at 37 b). If it were allowable to make a guess on a matter of such historical importance, I should surmise that *Taltarum's* case renders it probable that recoveries with single voucher were already in use, and showed, perhaps for the first time, that there were cases in which recoveries with double voucher were necessary.

In *Mary Portington's* case Coke cites some authorities that I have been unable to verify. Of those that I have consulted the most important is *Octavian Lombard's* case, Y. B. 44 Ed. III, 21, 22, which decided that where the tenant in tail in order to obtain a release from a person claiming by title paramount charges the land with a rent, the charge cannot be avoided by the issue in tail as it is for his benefit.

I venture, however, to think that a case reported in Y. B. Rec. Pub. 14 Ed. III, pl. 43 (1340), one hundred and thirty-two years before *Taltarum's* case, is an instance of a common recovery, as it is reported in the very words in which a reporter who had never heard of a common recovery would report it, if he was present in Court when it was suffered. The report says:—

'On a writ of right the tenant vouched to warranty one who came and warranted and afterwards joined in the mise on the better right, and afterwards made default. Wherefore Hillary adjudged that the demandant should recover against the tenant, to him and his heirs for ever, quit of the vouchee and of the tenant and of their heirs for ever, and that the tenant should recover over to the value against the vouchee, and that the vouchee should be in mercy,' &c.

There is another report to the same effect, the only material difference being that the name of Aldeburgh is substituted for that of Hillary.

Both Hillary and Aldeburgh were Justices of the Common Bench, so that it is possible that these are different reports of the same case, or they may be reports of different cases. The report does not state whether the tenant was seised in fee simple or in tail; in the former case it is probable that the decision gave rise to common recoveries; in the latter case we have a report of a common recovery itself.

Warranties of a tenant for life were declared void, and the collateral warranties of an ancestor who had not an estate of

inheritance in possession were declared void against the heir by 4 & 5 Anne, c. 16. But the statute did not extend to the alienation by a tenant in tail in possession; the consequence was that where a tenant in tail in possession after the statute discontinued with warranty, he barred his issue with assets, and the remaindermen without assets. This is a point which may still be of importance in the investigation of titles.

By the Fines and Recoveries Act, 3 & 4 Will. IV, c. 74, s. 14, warranties entered into after 1833 by a tenant in tail are made void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

It follows that the questions that I have discussed in this article have little more than a theoretical interest, except to those few who study the history of our law. I venture to ask any student who comes across a case that tends to throw light on these questions to inform me of it.

HOWARD W. ELPHINSTONE.

ON SOME DEFECTS IN THE BILLS OF LADING ACT, 1855.

THE Statute 18 & 19 Vict. c. 111, known as the Bills of Lading Act, 1855, after reciting that 'by the custom of merchants a bill of lading of goods, being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property,' enacts as follows:—

'(1) Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

'(2) Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

'(3) Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the Master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided, that the Master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.'

The objects of this Act were:—(1) To give the holders of a bill of lading the right to enforce the contract shown by that document, without reference to the shipper, at the same time putting on him the shipper's obligations under the contract; and (2), To enable consignees and indorsees to rely on the statement in the

bill of lading as to the goods shipped. I propose to discuss some points in which the Act has failed to effect these objects.

I.

Experience shows that cases often arise in which the person who holds the bill of lading, and is entitled to have possession of the goods, is not within the Act, and so cannot enforce the contract against the shipowner in his own name.

Soon after the Act was passed questions began to arise as to how far the property in the goods must have passed to the consignee or indorsee in order to bring him within it. In *The Freedom* (L. R. 3 P. C. 594) [1871] Sir J. Napier, delivering the judgment of the Privy Council, laid it down that 'it was intended by this Act that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser.' The plaintiffs there were consignees of the goods for sale; the consignors had indorsed the bill of lading to them, and they had as part of the transaction accepted and paid the consignors' bill for nearly the full value of the goods. They were therefore factors, with a lien and charge on the goods for their advances. It was held that 'the property in the goods' had passed to them within the meaning of the Bills of Lading Act.

And Sir R. Phillimore had previously in *The Nepoter* (L. R. 2 A. & E. 375, see pp. 378, 379) expressed the view that a consignee for sale would be within the Act, although he had not made advances against the particular cargo, if the consignor was indebted to him on an account current to which by arrangement the proceeds of the goods were to be carried.

In 1884 the majority of the Court of Appeal (Powen L.J. dissenting) held, in *Burdick* v. *Sewell* (13 Q. B. D. 159), that bankers or others who have made advances against goods, and to whom the bill of lading for the goods has been indorsed as security, are necessarily indorsees within the Act.

That judgment depended upon the view which had from time to time been taken by many Judges, that the indorsement of the bill of lading necessarily passed the legal property in the goods[1]; so that the transaction could not be merely a *pledge*; it could not operate to give the right to possession of the goods only, and not the goods themselves. But this view was definitely made untenable by the judgments in the House of Lords on appeal in the

[1] See especially *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; *Glyn* v. *East & West India Dock Co.*, in C. A., 6 Q. B. D. 475.

same case (*Sewell* v. *Burdick*, 10 App. Ca. 74). A bill of lading may be indorsed and transferred for one of several different purposes; it may be to complete a pledge, a mortgage, or a sale of the goods; or it may be only to enable an agent to receive them. It is now clear that there is no technical necessity that the property in the goods should pass to the indorsee, contrary to the intention of the indorser. And thus it depends on the intention with which the indorsement is made whether the indorsee can sue and be sued under the Bills of Lading Act.

In *Sewell* v. *Burdick* (10 App. Ca. 74) the Lords adopted the view that the transaction with the bankers, who there held the bill of lading, was only one of pledge; and that consequently, though they had a special property in the goods, they had not *the* property, in the sense necessary to make them liable to be sued under the Bills of Lading Act. The Lords reversed the judgment of the Court of Appeal; and it seems clear that their decision destroys the authority of the opinions expressed in *The Freedom* and *The Nepoter*, above referred to[1].

Two of the Lords, Lords Selborne and Blackburn, further expressed strong doubts whether the indorsement of a bill of lading is sufficient to transfer the rights and liabilities under the contract even where the parties have intended to effect a *mortgage* of the goods; that is to say, have intended to pass the legal property in the goods to the mortgagee, but have reserved a proprietary right to the mortgagor.

Lord Blackburn said (p. 96), 'I am therefore strongly inclined to hold that even if this was a mortgage there would not have been a transfer of "the" property within the meaning of 18 & 19 Vict. c. 111.'

And Lord Selborne said (p. 84), 'One test of the application of the Statute may perhaps be, whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods as to make it just and reasonable that he should also retain rights of suit (the word is *suit*, not *action*) against the shipowner under the contract contained in the bill of lading. If he does, the Statute can hardly be intended to take from him those rights and transfer

[1] The question in *The Freedom*, and also in *The Nepoter*, was as to the effect of the Admiralty Court Act, 1861, s. 6. Lord Selborne, in *Sewell* v. *Burdick* (10 App. Ca. at p. 88), took the view that the right of an indorsee to sue under that Act depended on his right under the Bills of Lading Act. Lord Blackburn (10 App. Ca. at p. 94) differed as to this. Lord Selborne, however (10 App. Ca. at p. 83), thought the decision in *The Freedom* might be right, on the ground that the indorsee there had, by claiming and taking delivery of the goods, 'elected to complete his potential and inchoate title, and so had placed himself towards the shipowner in the position of proprietor.' That is a view which does not seem to have been taken by any other Judge; and Lord Blackburn appears to have dissented from it (see 10 App. Ca. at p. 95).

them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities.'

Thus the effect, as regards the carrying contract, of any transaction short of an out-and-out transfer of the goods, must be regarded as still undetermined.

A bill of lading is frequently said to be a 'document of title' to the goods; more correctly it may be called the 'symbol' of the goods. Possession of it is, in legal effect, possession of the goods which it represents; except as against the shipowner who is carrying them, and persons holding for him, under his lien. And where a bill of lading has been properly acquired from the person entitled to transfer it, and is held by the holder in his own right, he has the right to possession of the goods, subject to the shipowner's liens. One who takes as a mere agent does not of course acquire the right of possession; still less does a thief do so.

The holder's further rights in the goods depend on the contract he may have made in relation to them. As Lord Bramwell has pointed out[1], the language of the Bills of Lading Act in reciting that 'a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee' is inaccurate. 'The truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made[1].'

It seems likely, having regard to the very different views which have been since expressed, and to the somewhat loose language used in the Bills of Lading Act, that that Act was not drawn with so clear an apprehension of the effect of an indorsement as is now possible, in the light of recent discussions. Perhaps the time has arrived when fresh legislation on the subject may be attempted with advantage. The object of the Act was to enable the holder of a bill of lading to enforce the contract of carriage in his own right, and correlatively to bind him by that contract. It now appears that this object has been achieved in cases where the holder of the document has bought the goods out and out, but probably in no other cases. The question is whether that is enough.

Seeing the possible difficulties in the way of enforcing the contract against the ship in the name of another person, especially where he lives abroad, and conversely of enforcing the contract on behalf of the ship against a foreign shipper, it may well be doubted whether convenience does not require an extension of the Act. On the one hand it seems desirable that the person who holds the bill of lading, and is entitled to have possession of the goods, should have the power of requiring the shipowner to perform his contract;

[1] In *Sewell* v. *Burdick*, 10 App. Ca. at p. 105.

and on the other hand the shipowner should be in a position to require the person who alone is entitled to have the goods to take them under the contract, and satisfy its conditions.

The amendment of the Act which is needed to bring this about, is to make the transfer to an indorsee of the rights and liabilities under the contract accompany *the right to have possession of the goods*, instead of 'the property in the goods.'

It must, however, be owned that such a result has not commended itself to high authorities. Lord Selborne, in *Sewell* v. *Burdick* (10 App. Ca. at p. 86), thought it would be the reverse of reasonable to impose upon an indorsee, who had merely taken a security, the burden of his indorser, under the bill of lading contract. And Lord Blackburn (at p. 95) said, 'I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of the borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities, which the Legislature has, by the Factors' Acts, shown it thinks ought rather to be encouraged.'

With much deference to the opinions thus expressed, it may be asked whether it may not also be unreasonable that the lender who holds a bill of lading, and therefore controls the possession of the goods, should be absolved from obligation under the contract. Fairness would seem to require that the lender should either re-indorse the bill of lading, or else should himself be bound to discharge the obligations of the contract, both as towards the shipowner who must deliver to him, and as towards the borrower who cannot himself claim delivery while the lender holds the document.

So far as the shipowner's claims are protected by a lien he can take care of himself; unless, as was the case in *Sewell* v. *Burdick*, the goods are not worth the charges upon them. But, apart from lien, he may be required to deliver the goods to the banker who holds the bill of lading as security, while he must look to the borrower who has indorsed to the bank for performance of the contract. Meanwhile the borrower, though theoretically he can still enforce the contract of carriage, cannot perform that contract by taking delivery of the goods, but is dependent upon the will of the banker to do so.

The point may be illustrated by a claim for detention of the ship at the port of discharge. Ought the banker, holding the bill of lading, to whom alone the goods could properly be delivered, to be liable for neglecting to take them? or ought his borrower, who could not claim the goods, to be liable?

The freight and other liabilities incurred prior to the indorse-

ment ought, of course, to be borne ultimately by the borrowing indorser. But the lending indorsee would take the security with notice that there were or might be such liabilities attaching to it. There ought, no doubt, to be reserved to him the right to add to his charge on the goods any sums he may be required to pay under the contract in discharge of liabilities which should have been met by his indorser.

Another possible objection to the proposed change is that the transfer of the rights under the contract to a lender would deprive the borrower of those rights, although he may be the person really interested. The lender might, however, in such a case be compelled to sue as trustee for his borrower, or to allow the borrower to sue in his name. And that appears to be a safer position than to leave the lender to sue in the borrower's name, as at present.

A suggestion was made by Lord Selborne, in *Sewell* v. *Burdick* (10 App. Ca. at p. 86), that under the Bills of Lading Act an 'indorsee by way of security, though not having the "property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and that he actually does so as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title.'

This view of the Act was not adopted by any other of the Lords, nor is it, that I am aware, supported by any other authorities. It seems rather to have been put forward as a suggestion of a reasonable solution, than as a construction of the words of the Statute. But, as an amendment of the Act, it seems to be defective in that it would leave the indorsee at liberty to take delivery of the goods or not, at his choice. As I have already contended, he ought either to be ready to complete the contract in the bill of lading by taking delivery, or he ought by re-indorsing to enable his indorser to do so.

The main object of the suggested amendment would be to benefit indorsees, by making them independent of their indorsers; and thus to make the bill of lading a more satisfactory security. But it would also, as it seems to me, have the result of putting the indorser in a fairer position.

II.

A second defect in the Act which calls for discussion is its inapplicability to *through bills of lading*, in many, if not in all, cases. Attention was drawn to this in a recent number of this Review,

by Mr. H. D. Bateson. The modern practice of carrying goods under through contracts, for transits partly by land and partly by sea, or for voyages in the course of which they are to be transhipped, makes the matter one of considerable practical importance. I propose to discuss the bearing of the Act upon these contracts, and to illustrate this chiefly by reference to the cotton trade with the United States, in which these through contracts are much used. A through bill of lading differs from an ordinary bill of lading in that it is not a contract for a single transit but for a transit in two or more parts; the carriage under it is to be performed, not by one carrier, but by a succession of carriers, each of whom intends to be liable only for his part of the journey. The most important classes of through bills of lading also differ from ordinary bills of lading, in that they are not wholly for an ocean transit, but are in part to cover a land journey. It is to these that I shall at present refer.

Let us say then that a bill of lading is given at Memphis (Tennessee) to a merchant who there delivers a number of bales of cotton to a railway company. It represents that that company and its connections will carry the cotton to, let us say, Norfolk (Virginia), and there deliver it to a certain steamship, or to one of a named line of steamers, in which it is to be carried to Liverpool and there delivered to the order of the original shipper, on payment of an agreed rate of freight which covers the whole journey.

The object of using this through document is not merely to simplify the transport arrangements, but also to at once furnish the merchant with a document to represent the goods, and so enable him to obtain advances from bankers upon them. The through bill of lading given at Memphis must therefore be of such effect that the bankers there will be safe in treating it as a document of title to the cotton, in the sense that holding it he will constructively hold the cotton until it is delivered up at Liverpool; and, for his protection, delivery at Liverpool must by the contract be to the holder of that document; no one else must be in a position to claim the cotton from the ship which in fact delivers it there.

But the document also shows, or purports to show, a contract for the carriage of the cotton all the way from Memphis to Liverpool. To be satisfactory it should really do this; under it the shipper ought to have a contractual right to the proper performance of each part of the journey. As we shall see there is a difficulty about this, owing to the uncertainty as to what ship will carry the cotton from Norfolk, and to the fact that the railway companies do not themselves undertake for the completion of the transit to Liverpool. Further, the contract should, if possible, be so made as to enable the shipper to transfer his rights and liabili-

ties under it to the transferee of the cotton. There are both practical and technical difficulties in the way of satisfying these requirements.

With regard to the point that the through bill of lading must be a document of title, I shall say very little. Whether bills of lading of this kind do, or do not, come within the settled rule as to the effect of indorsing and delivering an ordinary bill of lading, it is the fact that for many years past through bills of lading have been treated by business men as documents of title, negotiable in the same manner as ordinary bills of lading. There can, I should think, be little doubt that custom has extended the rule of negotiability in this sense to these documents.

The point, however, that the through bill of lading must, for the protection of its holders, be *the* document of title until delivery at the destination requires to be borne in mind. It affects, as we shall we, any scheme under which a separate bill of lading is given by the ship which carries the goods.

I turn then to the question of the *contract* shown in the through document. If the cotton in fact comes forward in a ship which is there named, and if the contract is made on behalf of the owners of that ship, and with their authority, they are bound by it, and are responsible to the original shipper (in the first instance) for any loss or damage, subject to the exceptions of the contract. And on the other hand they can enforce against him the obligations as to payment of freight, &c., expressed or implied in the document.

But in practice, though a ship may be named in the through bill of lading, it is quite uncertain whether that ship will carry the cotton. The movements of ships, and the time occupied by the railway transport, cannot be calculated with sufficient accuracy. And thus it is always provided in these contracts that the goods may be forwarded in *a ship or ships* other than the one named.

Even where the contract provides for forwarding, not by a particular ship, but by one of a certain 'line,' it is found necessary to reserve liberty to ship by other lines. Moreover a 'line' of steamers often means nothing more than steamers provided for the service by a person who works the 'line,' and who charters them for the occasion. So that a contract made with the organiser of a 'line' does not necessarily bind the owners of the steamer which carries the cotton; and the ordinary remedies against those owners, or against the steamer herself, for breaches of the contract of carriage may be unavailable. The proprietor of the line often resides in the United States, and he is not necessarily a man of substance. The personal remedy against him must be pursued in the United

States, and judgment against him, if obtained, may remain unsatisfied.

In order then to make the owners of the ship, and the ship herself, liable on the contract for the sea-transit, it becomes essential in the cases we are considering to have a separate contract made with the owners of the ship when she has been ascertained. The contract with them cannot be made as part of the through bill of lading. That may contain the terms on which it is intended that the goods shall be carried by the ship, but as the shipowner is not ascertained when the through bill of lading is made, the agent who signs it cannot make it on his behalf; nor can he ratify it. 'The law requires that the person for whom the agent purports to act must be one who is capable of being ascertained at the time the contract is made' (per Willes J. in *Watson* v. *Swann*, 31 L. J. C. P. 210, 214). There must therefore, to bind the shipowner, be a second contract (a ship's bill of lading), not part of the through bill of lading, and not necessarily transferred with that.

The practice in the cotton trade hitherto has been for the master of the ship to give receipts for the cotton to the railway company which delivers it to him. These receipts describe the numbers and marks of the bales supposed to be shipped on board; and they express that these are bales comprised in a through bill of lading, the particulars of which are referred to, and that they are to be delivered to the holder of that through bill of lading at the destination on payment of the through freight.

Owing to the manner in which the delivery is made to the ships by the railway companies, and to the way in which the lading is done, and also to the fact that the bales are counted and the receipts given by the master before the cotton is on board, very frequent mistakes have occurred as to the numbers and marks actually carried. The numbers turn out short of the receipts, and marks are found in the ship which were not supposed to be there at all. This has led to many claims; and also to very irregular practices, in the way of giving and taking cotton belonging to other people, in place of that which ought to be forthcoming for the consignees. It is obviously important to the cotton importers that they should be in a position to enforce the contract with the shipowner; and if possible to make him responsible for the bales for which his master has receipted.

It is not of so much practical importance to the shipowner to be able to enforce the contract of carriage against the consignee, since he can take care not to deliver the goods until the freight is secure. But cases do arise in which it is important for him to have a remedy

by contract against the consignee; for example, for freight where the goods, after paying charges on them, are not worth the freight; or for improper detention of the ship at the port of discharge. It is therefore in the interest of both that the relationship of contracting parties should be established between the shipowner and the consignee of the cotton. Can this be done under the law as it stands, either by means of the through bill of lading, or by a ship's bill of lading for the ocean transit subordinate to the through bill of lading?

1. First, as we have seen, when the ship is known beforehand, and the shipowner is a party to the through bill of lading, that constitutes an effectual contract available to the shipper. But even in such a case there is a technical difficulty in the way of an *indorsee*. For it is open to serious question whether the through bill of lading is within the meaning of the Bills of Lading Act, 1855. That Act was passed before these documents were much, if at all, in use; and when a bill of lading was apparently understood to mean a document given for goods which had been put on board a ship to be carried on a voyage. The Act was passed with reference to the custom of merchants by which 'a bill of lading of goods being transferable by indorsement the property in the goods may thereby pass to the indorsee,' and that custom had only been established with reference to bills of lading in the above sense. The careful expression of the custom, in the special verdict of the Jury in the second trial of *Lickbarrow* v. *Mason* (5 T. R. 683), shows that it had reference to bills of lading for goods shipped for a voyage. The words of the finding were, that 'by the custom of merchants bills of lading expressing goods or merchandizes to have been shipped by any person or persons to be delivered to order or assigns have been and are at any time after such goods have been shipped, and before the voyage performed for which they have been shipped, negotiable and transferable by the shipper' indorsing and delivering them; 'and that by such indorsement and delivery or transmission the property in such goods hath been and is transferred and passed to such other person or persons.' It cannot be doubted that the words 'shipped,' and 'voyage,' were there used with reference to a *ship*, and to an *ocean* transit.

It may indeed be suggested that the through bill of lading, though not within the Bills of Lading Act before the goods get on board the ship, becomes so as soon as they are on board. And if the contract in it is made on behalf of the shipowner, or so as to bind some one with reference to the ocean transit, that would seem to be the case. But the questions which most frequently arise are with reference to goods which, according to the master's receipts,

have been delivered to the ship, but have not got on board. If then the contract as to those goods is not negotiable the consignee is not out of the difficulty.

2. Next, as to the more common cases in which the owner of the ship which carries the goods is not a party to the through bill of lading. Here, as we have seen, if any contract is to be established between the shipowner and the consignee, it must be by means of the receipt or bill of lading given by the ship at the loading port.

That contract, however, is made with the railway company, or with the principal for whom that company acts. The railway company in fact ships, and is bound to ship, under the through contract; but as it does not undertake any liability after shipment, it does not require to make any contract on its own account. It may, however, contract with the shipowner on behalf of the shipper, or of any ascertained or ascertainable consignee. The practical difficulty is that, as the goods are often not sold at the time of shipment, no English consignee can then be named. And the contract cannot be made on behalf of indefinite consignees to be ascertained in the future. (See *Watson* v. *Swann*, supra.)

Supposing the shipment to have been made by the railway company on behalf of the original shipper, or of the holder of the through bill of lading, he might probably sue the ship for loss or damage to the goods, even though he had sold them; the action being brought for the benefit of the persons entitled to the goods[1]. But where the shipper or the holder of the through bill of lading is in America, a remedy in his name may not be satisfactory. He may not care to sue, although indemnified; and, if he does sue, there are inconveniences, such as the need for security for costs, difficulties of discovery, and so forth.

Again, as the goods are still to be represented by the through bill of lading, they cannot be represented by the receipt or ship's bill of lading under which the shipment is made. It is, as we have seen (*supra*, p. 296), essential that the right to possession of the goods shall be controlled by the holder of the through bill of lading. Hence it seems clear that the ship's bill of lading cannot be a bill of lading within the meaning of the Bills of Lading Act; and therefore that the contract expressed in it is not transferable by indorsement of that document.

Further, it seems clear that as this contract with the ship is not part of that shown by the through bill of lading, and cannot by anticipation be made so, it cannot be transferred to a consignee by any indorsement or assignment of the through bill of lading.

[1] See *Dunlop* v. *Lambert*, 6 Cl. & F. 600; *Davis* v. *James*, 5 Burr, 2680.

At a Conference held at Liverpool in June, 1889, of shippers and shipowners and others engaged in the cotton trade, a form of ocean bill of lading, to be used in connection with through bills of lading, was agreed upon, which aims at removing the difficulties above pointed out.

Its special features are shown by the following extracts:—

'*Ocean Bill of Lading, to be used only in connection with through Bills of Lading.*'

'Shipped in apparent good order and condition by..... *on behalf of the present holders of the through Bill of Lading* referred to in the margin hereof.....from..... in and upon the good British steamship.....now lying in the port of.....and bound for.....with liberty to call at....., being marked and numbered as per margin (weight, quality and contents and value unknown, *but in the absence of fraud or clerical or obvious errors the Bill of Lading is signed by the Master, and in accordance with the mate's receipts shall be conclusive evidence against the owners of the quantity of cargo received as stated therein*), and to be delivered in like good order and condition from the steamer's tackle (when the carrier's responsibility ceases) at the port of..... (or so near thereunto as she may safely get and always lie afloat) *unto the holders of the through Bill of Lading at the time of delivery; and this Ocean Bill of Lading is only negotiable to such holders*, he or they paying freight,' &c., &c.

And in the margin is the following clause:

'The goods referred to in this Bill of Lading are such portion of those mentioned in the Through Bill of Lading, No..... dated.....and shipped at.....by..... as have been *actually put on board the steamer;* but the said goods are only carried on the terms and conditions of this present Ocean Bill of Lading, and *are to be delivered upon presentation of the said Through Bill of Lading, and this Ocean Bill of Lading together;* or *upon the Through Bill of Lading alone, provided that the Master is satisfied by comparing the same with his copy of Ocean Bill of Lading, of the identity of the goods called for;* and provided that the consignee gives a guarantee satisfactory to the shipowner against all claims by holders of the Ocean Bill of Lading, and to produce the latter in due course; and indemnifies the owners and Master against all claims by holders thereof, in consequence of delivery without production thereof.

'.....Master.'

From this it will be seen that the ocean bill of lading is taken on behalf of the then holders of the through bill of lading, and is only to be negotiable with that document. The through bill of lading remains the document of title; and the contract of carriage made with the shipowner, shown by the ocean bill of lading, is

to be grafted upon the through bill of lading. The two documents, representing the goods and expressing the contract for the sea carriage, are to be held and transferred together.

It is, however, difficult to see that this arrangement can, under the Bills of Lading Act, 1855, effect the transfer to the indorsee of the rights and liabilities under the ocean contract. Neither document by itself will do it. For the through bill of lading, even if within the Act, does not contain the ocean contract; and the ocean bill of lading is not within the Act, since it does not represent the goods.

Nor can the two do more together than they can alone. The ocean bill of lading merely refers to and depends upon the through bill of lading; while the latter, which, as representing the goods, is the real bill of lading within the meaning of the Act, is altogether independent of the ocean bill of lading. The Act contemplates a document which is the document of title, and at the same time expresses the contract.

To make the scheme effective it seems to be necessary to amend the Bills of Lading Act, and the scheme itself suggests what the amendment ought to be. In effect it should be provided that, where a bill of lading given for goods already in transit under a through bill of lading is expressed to be negotiable with that document, then every indorsee of that secondary bill of lading who also holds the through bill of lading, and is entitled to the property in [or, *possession of*] the goods, shall have transferred to and vested in him all rights of suit, &c.

I have referred, in discussing this question, to through contracts under which the transit is partly to be by land. But it is evident that similar difficulties arise, although the whole transit is to be by sea, in cases where the goods are to be transhipped at the destination of the first carrier, and forwarded in a vessel which is not ascertainable at the time of the original shipment, or for which the first carrier does not contract.

Here also a second bill of lading becomes necessary which must be subordinate to the through bill of lading. And the same need of an amendment of the Act is felt. For the indorsee of the through bill of lading, though he may also hold the secondary bill of lading, fails in the same way to get the right to enforce the contract against the second ship.

III.

In the year 1851 the Court of Common Pleas decided, in the case of *Grant* v. *Norway* (10 C. B. 665; 20 L. J. C. P. 93), that a ship-

owner is not bound by a statement in a bill of lading, given by his master, as to the quantity of goods shipped under the bill of lading. For the authority of the master to give a bill of lading is limited to the goods which have been actually shipped.

Grant v. *Norway* was an action on the case against shipowners, by indorsees of a bill of lading signed by the master, on the ground that they had been induced to advance money upon the goods which the bill of lading represented to have been shipped, whereas in fact the goods never had been shipped. Jervis C.J., in delivering the considered judgment of himself and Cresswell and Williams JJ., said, 'It is not contended that the captain had any real authority to sign bills of lading unless the goods had been shipped. Nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills whether the goods were on board or not[1].'

As that case was before the Bills of Lading Act, 1855, the indorsees were not able to claim performance of the promise to deliver the goods, as made in the bill of lading. The indorsee in such a case could now sue the shipowners on the contract; but only if that contract was one which the master had real or apparent authority to make on their behalf. The principle of the case therefore still applies[2].

Lord Esher, referring to *Grant* v. *Norway*, in the recent case of *Cox* v. *Bruce* (18 Q. B. D. 147, at p. 152), said:—'The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorised to perform all things usual in the line of business in which he is employed.'

These cases decide what the law is. But it is open to question whether the rule thus laid down is a just one. Certainly, it is not a convenient rule for the numerous persons who in the ordinary course of their business pay or lend money upon the faith of the statements made in bills of lading. And it was probably because business men were alarmed by the law as stated in *Grant* v. *Norway* and *Hubbersty* v. *Ward*, that, in 1855, the 3rd section of the Bills of Lading was enacted.

That section makes 'every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel conclusive evidence of such

[1] 10 C. B. at p. 688. See also *Hubbersty* v. *Ward* (1853), 8 Ex. 330; 22 L. J. Ex. 113.
[2] See *Cox* v. *Bruce*, 18 Q. B. D. 147; *Thorman* v. *Burt*.

shipment *against the master or other person signing the same*,' unless the holder of the bill of lading has taken it with notice that they were not in fact shipped. But this is subject to the proviso 'that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part and wholly by the fraud of the shipper or of the holder or some person under whom the holder claims.'

This section only makes the bill of lading conclusive against the person *in whose name*, and with whose authority, it is signed. The signature of the shipowner's agent, in his own name, does not make it binding against the shipowner. The language of the Act clearly indicates this, and the point has been settled by authority[1].

But the section has, in consequence, been of little or no practical use. The agent of the ship, who often signs the bill of lading, is not as a rule a party to the contract contained in it. And though the master, when he signs in his own name, without qualification, is regarded as a party to that contract, it is not often practically useful to sue him.

A further obstacle to the effectiveness of the section is that, although the bill of lading may state the number and marks of the packages shipped, or the weight of the goods shipped in bulk, it nearly always contains a clause like 'weight, quantity, and quality unknown.' Such a clause prevents the statement of the quantity shipped from being conclusive evidence, even as against the master or person who signs the bill of lading[2]. It makes that statement mere language of the shipper.

Thus it would seem that the objects with which sect. 3 was passed have not been attained. Whether it is still desirable to effect those objects may be a question. But there is much to be said against the present immunity of the shipowner. Bills of lading are, it is understood, sometimes given, without regard to their accuracy, upon letters of indemnity from the shippers. In some trades it is, or has been, the practice to give bills of lading for goods before they have got alongside the ship; and even before they have arrived at the loading port. And it is undoubtedly true that mistakes, which care and a better arrangement of the business might prevent, are very frequently made to the great inconvenience and loss of importers. That has been especially true, as already noticed above, in the United States cotton trade.

The accuracy of the bill of lading statements is a matter which is

[1] *Jessel* v. *Bath*, L. R. 2 Ex. 267; *Brown* v. *Powell Coal Co.*, L. R. 10 C. P. 562.
[2] See *Jessel* v. *Bath*, L. R. 2 Ex. 267.

generally within the control of the shipowner, although no doubt the shipper has often very much to do with it. The shipowner may, if he chooses, insist on the goods being weighed, or counted, as they are taken on board, or under supervision of his own men; and if those whom he appoints to check or supervise are neglectful there would be nothing extraordinary, or unjust, in making him responsible for their neglect.

It could hardly be considered unjust to amend sect. 3 to the extent of making the bill of lading statements conclusive evidence (in the cases and subject to the provisoes there mentioned) against the principal, as well as against the agent who signs the document.

But to make the shipowner responsible for inaccuracies in practice it will be necessary to go further, and provide that, where the bill of lading represents that a definite quantity of goods has been shipped, that shall be regarded as a representation by the shipowner, and shall be conclusive evidence against him of the shipment of that quantity, notwithstanding the insertion of general clauses inconsistent with that representation.

Shipowners might of course refuse to give bills of lading which represented that any particular quantity had been shipped. It would be for shippers, and bankers, and consignees to determine whether they would take bills of lading in such a shape. Where however definite statements are made, as at present, it seems not unfair to say that they are misleading unless they do bind the shipowner.

In the new form of ocean bill of lading adopted by the Liverpool Cotton Conference, already referred to (*supra*, p. 300), it will be noticed that a clause has been inserted with a view to the point above discussed. It is there provided that 'in the absence of fraud or clerical or obvious errors the bill of lading, if signed by the master and in accordance with the mate's receipts, shall be conclusive evidence against the owners of the quantity of cargo received as stated therein.' This, so far as it goes, seems likely to be a useful clause. It makes the shipowner answerable, subject to exceptions, for any deficiency in what is turned out from the quantity stated in the bill of lading. But a subsequent clause in this Conference bill of lading, provides that 'no bill of lading or mate's receipt shall be signed except for cargo already on board, which is to be shipped in single compressed bales, and the carriers shall not be liable except for goods actually put on board.' This perhaps indicates an intention to change the present practice at the shipping ports. But it leaves it open to question whether the clause making the bill of lading conclusive evidence will avail where the

bill of lading or mate's receipt is signed, as now, before the cotton is on board.

It would also be desirable to make it more clear whether the shipowner is to be answerable for turning out *marks* which do not agree with the statement in the bill of lading; that is, for tendering bales which do not belong to the consignee in place of bales which do.

Another point of considerable interest has been recently decided by the Court of Appeal (affirming Grove J.) in the case of *Thorman* v. *Burt* (54 L. T. 349), which further extends the doctrine of *Grant* v. *Norway*. It was held that the master of a ship has no authority to sign bills of lading for goods which have not actually been put on board, although they have been received alongside, and taken into the ship's custody, for the purpose of being carried. And consequently that the indorsees of such bills of lading cannot sue upon them in relation to the goods not put on board.

In *Thorman* v. *Burt* the ship loaded timber at Dantzic; 7497 pieces of timber had been brought alongside and placed in the custody of the ship; and a mate's receipt had been given for them. Subsequently 216 of the pieces were in some way lost from the rafts before getting on board. Bills of lading were however signed by an agent, on the authority of the captain, for the whole 7497 pieces, as being 'in the hold.' Indorsees of these bills of lading claimed for short delivery of the 216 pieces. But the Court held that they had no right of action; for they could only claim under the bill of lading contract, and that was only binding on the shipowner in respect of the timber actually put on board. So far as the bills of lading related to goods not put on board they were given without authority.

The fact that the whole of the timber had been put into the custody of the ship, and that consequently the shipowner was answerable for it to the *shippers*[1], was not regarded as material; for the claim of the indorsees was made by virtue of the Bills of Lading Act, and was confined to what could be claimed under the bills of lading.

It is worth noticing that no suggestion seems to have been made in that case that the Bills of Lading Act, apart from any question of the master's authority, relates only to documents for goods actually *shipped*. In that negative way the case is an authority against a difficulty suggested earlier in this paper (*supra*, p. 298).

But the case shows that a consignee or indorsee may fail to acquire all the rights against the shipowner which his consignor or

[1] The shorthand notes of the trial show that the liability to the shippers was admitted, subject to possible defences as against them.

indorser has in relation to goods delivered to the master or agents of the ship for shipment, notwithstanding that the goods are 'named' in the bill of lading (see s. 1). And thus it affords an additional reason for making the statements in the bill of lading as to the quantity shipped conclusive evidence against the shipowner.

T. G. CARVER.

MARRIAGE AND IMMOVEABLES.

MR. DICEY, at pages 182, 183 of his book on the Law of Domicil, will be found to say, Rule 34—A child born anywhere in lawful wedlock is legitimate. Rule 35—The law of the father's domicil at the time of the birth of a child born out of lawful wedlock determines whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents. . . . . But a person born out of lawful wedlock cannot be heir to English real estate, nor can any one, except his issue, inherit English real estate from him. And then he adds, in a note, 'The principle of this proviso applies when the child is the offspring of the marriage between a man and his deceased wife's sister. Such a marriage when celebrated in a country such as Denmark by Danish subjects there domiciled is probably valid, even in England, but the child of such a marriage cannot inherit English or Scotch real estate, since it has been held,' he continues, citing *Fenton* v. *Livingstone*[1] and the words of an opinion dated in November, 1872, and signed 'John Westlake'[2], 'that in order "to inherit land it is not enough to be the issue of married parents, but it is also necessary to be the issue of parents who would have been married if they had gone through the ceremony of marriage in the country where the land lies".'

The rules make clear the meaning of the proviso, and the proviso itself is in no way open to doubt. But, in another place[3], Mr. Dicey writes, 'The law of domicil does not affect rights in respect of immoveables. All questions whatever connected with immoveables are determined by the *lex situs*.' So Mr. Foote: '*Doe* v. *Vardill*[4] decided that succession to immoveable property demands not only legitimacy by the personal law, but legitimacy by the *lex situs*, that is that the persons concerned shall have been born in what the law of England calls wedlock, speaking for itself, and not as adopting principles of comity[5].' What I purpose

[1] 3 Macq. 497.
[2] Parl. Paper, No. 145, April 3, 1876.
[3] Domicil, p. 150.
[4] 2 Cl. & F. 571; 7 ib. 895.
[5] Private International Jurisprudence, p. 55. The words cited from Mr. Westlake's opinion are, on the face of them, capable of an interpretation which would make it necessary that, in this respect, the ceremony should comply with the formalities required by the law of England in the case of a marriage celebrated, or pretended to be celebrated, in this country. But it appears from the context and the case that this is not what was meant. I have nowhere, indeed, found such a rule suggested. The law of England, however, speaking for itself, as I take Mr. Foote, does not call a marriage 'per verba de presenti' in Scotland 'lawful wedlock.'

is an attempt to show—not, I need hardly say, without misgiving—that Mr. Dicey's lastly cited statement and this proposition are too sweeping, and that the principle of the proviso to Rule 35 does not really warrant or require its application as in the note.

My position is this:—

The question to be determined being, In whom is the property in English immoveables, the law of England will hold no right as incident to or established by any marriage relied on in support of title which the law of the locality does not regard as incident to or established by a marriage, but it does not try the validity or invalidity of the marriage itself by the law of England to any greater extent than it does in a purely matrimonial cause. Or to put it in another way, *A*, by reason of his being *B*'s husband, will not acquire any rights in land in England which are not, under the circumstances, given to him by the law of England, but to ascertain whether or no *A* is the husband of *B* the law of England will pay the same amount of regard to the law of the domicil and of the place of solemnization in determining a claim by *A*, by marital right, to an interest in *B*'s land in England, as it would in determining whether a subsequent marriage of *A* with *C*, *B* living, was valid or no.

As to what may, or may not be, the law of Scotland I do not propose to enquire. But as the question has been considered in the House of Lords on appeal from the Court of Session, it will be necessary to give some attention to the case in which this was done.

Now keeping for the moment to Mr. Dicey's note, it is not quite clear that the conclusion at which he there arrives can be supported by his own opinion as expressed elsewhere. 'It is necessary,' runs the quotation, 'to be the issue of parents who would have been married if they had gone through the ceremony of marriage *in the country where the land lies*.' But when Mr. Dicey comes later to speak of marriage he writes, on the authority of Mr. Westlake[1], 'A marriage is not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other (?).' And, beyond this query he adds, that, in spite of this weighty authority, it must be admitted that the invalidity of such a marriage is not free from doubt. Because, as he says, recent decisions, citing *Sottomayor* v. *De Barros*[2] and *Brook* v. *Brook*[3], certainly suggest the conclusion that capacity for marriage is governed by the *lex domicilii* and not by the *lex loci contractus*, whilst American authorities apparently support the

[1] § 344. ed. 1; § 15. ed. 2. [2] 3 P. D. 1. [3] 9 H. L. C. 193.

view that such a marriage would be regarded as valid in the United States, even though solemnised in England[1]. Elsewhere[2] I have ventured to point out that the cases cited by Mr. Westlake in this behalf decide only that the ceremony must be in accordance with the *lex actus*. The point has never expressly arisen in England, and the discussion cannot be carried further. If it is only necessary that the parents would have been married if they had gone through the ceremony of marriage in the country where the land lies, then if a marriage good by the foreign domicil is good in England, though contracted in England and contrary to the law of England in the strict sense, there is an end of the question for any practical purpose. But I rather suppose that Mr. Westlake, holding incapacity by the *lex actus* to be fatal, meant that the *lex situs*, between which and the *lex actus*, in this view, there would be no difference, was the determining law.

The earliest case is *Ilderton* v. *Ilderton*[3], decided in the Common Pleas in 1793, and in this wise. Writ of dower *unde nihil habet* of lands in England. Declaration. Plea *ne unques accouplé in loyale matrimonie*. Replication, that the demandant was, in 1774, accoupled to T. J. deceased in lawful matrimony at Edinburgh. Conclusion to the country. Special demurrer stating for cause that the supposed marriage in the replication mentioned was not a marriage whereby the demandant could by law claim or entitle herself to have any dower of the tenements in the declaration mentioned; that there was no venue laid, and that the replication was wrong in concluding to the country. Joinder in demurrer. It was admitted at the bar, and assented to by the bench, that the first cause of demurrer could not be maintained, it being taken as an undoubted proposition, that a marriage celebrated in Scotland was such a marriage as would entitle the woman to dower in England. The Court, by the mouth of Eyre C.J., gave judgment for the demandant on the other two points as well.

Speaking of this case in *Doe* v. *Vardill*, in the first opinion delivered to the Lords, Alexander C.B. says:—'Take the case of *Ilderton* v. *Ilderton*, that is the case of a claim to dower by a foreign widow: whether she is a widow or not, that is, whether she was the lawful wife of the man who was, during the coverture, seized of the land, is a question which the law of England permits to be determined by the foreign law, the law of the country where the contrast was made: there the comity stops. When the character

[1] Wharton, § 141. The above is from Dicey, p. 216.
[2] Selected Cases in Private International Law, p. 93.
[3] 2 Hy. Bl. 145.

of widow shall have been fixed according to these foreign rules, the law of England comes into action, and, proceeding inexorably by its own provisions and regulations, decides what are the interests in the English land which her character of widow has conferred upon her: it inquires what are the rules which attach upon the particular land in favour of a widow. If, upon that inquiry, it appears that the land is subject to the common law, it will give her a third, if it appear to be gavelkind, one half, while she remains *casta et sola;* if the land be customary land of any manor she can only have what the custom may bestow [1].'

Here then is an authority now nearly a century old explained in this way more than half a century ago. There is not a word, not a hint, that because the claim was a claim to a right in immoveables that, therefore, the validity or invalidity of the marriage must depend on the law applicable to marriages celebrated in England or between English domiciled subjects. When the marriage was established by the foreign law, then the effect of it upon English land was to be determined by the law of the locality. This is a very different thing from trying the marriage itself by the straight law of England. I would ask that it should be remembered that it is only the other day that it was held that capacity to contract is regulated by the *lex domicilii*, and that at this time the tendency was to look to the *lex actus* alone [2].

Next in date is *Doe* v. *Vardill*[3]. John Birtwhistle, the lessor of the plaintiff in an action of trespass and ejectment for one undivided third part of lands in Yorkshire, was born in Scotland of parents domiciled in that country, and married there but not till after his birth. He was the only son of his parents and was legitimate for all purposes by the law of Scotland. In 1826 the King's Bench gave judgment for the defendant. A writ of error was brought and the cause argued in the Lords, before the Judges, in 1830. The excerpt already printed fairly represents the ground of the Judges' opinion. They assumed that *B* was the eldest legitimate son of his father in England as well as in Scotland, but they had also to consider whether that status entitled him to the land in dispute as the heir of his father. That question was to be decided according to those rules which govern the descent of real property in England. A man is not the heir of English land merely because he is the oldest legitimate son of his father. To answer to that description he must be *born in* lawful matrimony. *B* was not born

[1] 2 Cl. & F. 571.
[2] See *Male* v. *Roberts*, 3 Esp. 163; *Solthomayor* v. *De Barros*, 3 P. D. 1; S. C. 5 P. D. 94; *Cooper* v. *Cooper*, 13 App. Ca. 88; *Re Cooke's Trusts*, 56 L. J. Ch. 637.
[3] 5 B. & C. 438; 2 Cl. & F. 571; 7 ib. 895; Selected Cases, 125.

in matrimony at all, therefore *B* was not entitled to land in England as the heir of his father.

In accordance with an order of the House the case was reargued in 1839. This time Tindal C.J. delivered the opinion of the Judges. He said that even assuming that the Scotch held a marriage celebrated between parents after the birth of a child to be conclusive proof of actual marriage before, that was no reason why a foreign country, which adopts the marriage as complete and binding as a contract of marriage, must also adopt this consequence; which would be, in effect, to adopt a rule of evidence prevailing in a foreign forum. The heir must be born in actual matrimony. It was the opinion of the Judges that *B* was not entitled to the real property as the heir of his father.

Subsequently Lord Brougham, as he had after the first hearing, spoke against the opinion of the Judges, but, presumably out of mercy to the litigants, the cause having now attained to its sixteenth year, did not move. Cottenham L.C. expressed his concurrence with the Judges, and moved judgment for the defendant in error.

How is this a decision that the parties must have been married if they had gone through the ceremony in the country where the land lies, or that the persons concerned must have been born in what the law of England calls wedlock, speaking for itself? 'Since the preceding sheets were worked off,' wrote Story in a note to § 483 *a* of the second edition of the Conflict of Laws[1], 'I have ascertained[2] that the case of *Birtwhistle* v. *Vardill* has been affirmed in the House of Lords. The ground was that by the law of England no person could inherit land as heir who was born after the marriage of his parents.' The opinion of Mr. Westlake, as expressed in the second edition of his book, is substantially the same[3]. So Cotton L.J.:—

'All that was actually decided in that case [*Doe* v. *Vardill*] was, that the eldest son born in Scotland before marriage of parents domiciled there, though by the Scotch law legitimate, by reason of the subsequent marriage of his parents, was not capable of taking land in England as heir of his father . . . He [Tindal C.J.] stated the ground of their [the Judges'] opinion to be, that they held it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother[4].'

Then we come to *In re Don's Estate*, 1858[5]. *D* was born in Scot-

[1] 1841. P. 681, ed. 8. [2] Citing 1 Robert. App. 627. [3] § 168.
[4] *Re Goodman's Trusts*, 17 Ch. D. 266, 293. James L.J. to the same effect, ib. 299.
[5] 27 L. J. Ch. 98.

land in 1818. In 1819 his parents intermarried in Scotland. In 1855 *D* died intestate, seised in fee simple of land in England and without ever having been married. Kindersley V.C. held that 'issue' in sec. 3 of 3 & 4 Will. IV. c. 106 was intended to be used in the sense of issue capable of inheriting by the law of this country, and that therefore *D*'s father, who survived him, was not capable of being heir to *D*, *D* not having been *born in* marriage.

The remaining English decision requires closer attention. W. L. B., by his will, dated in September, 1855, gave and bequeathed Meltham Hall and its appurtenances, not to include his mill property of any description, to his eldest son J. W. B. The residue of his property he gave and bequeathed to the said J. W. B., to his daughter C. J. B., to his reputed son C. A. B., to his reputed daughter C. A. B., and to his reputed daughter S. H. B., as tenants in common. The testator died in the same month. A bill for administration was filed in 1856, the plaintiffs being the above-named younger children, and the defendants the trustees and the eldest son. Before the case was set down to be heard, C. A. B., the younger son, died a minor. A bill of revivor and supplement was thereupon filed by the three surviving plaintiffs in the original suit against the defendants in the original suit and the Attorney-General, averring that the Attorney-General, on the alleged ground that the late plaintiff, C. A. B., was the issue of the second marriage of the testator, and that such marriage, being with the sister of the first wife of the testator, then deceased, was invalid, claimed on behalf of the Crown the real and personal estate of the late plaintiff, C. A. B. The chief clerk's certificate, in answer to enquiries directed at the hearing, found in effect, that the testator was married in 1850 to the sister of his deceased wife, that both parties were then domiciled in England, that the marriage took place in Holstein, where it was a good marriage and where the children of such a marriage were legitimate, and that the issue of this marriage were C. A. B., the deceased plaintiff, and C. A. B. and S. H. B., the reputed daughters. The question whether this marriage was valid by the law of England was argued upon further consideration. The answer to the question affected the right to the property of the deceased C. A. B., both real and personal; the right of administration to his personal estate; and the amount of legacy duty payable by the two daughters. *Doe* v. *Vardill* was not cited by the Crown counsel, but was relied upon by the other side. Cresswell J., who sat as assessor to Stuart V.C., was of opinion that the marriage was invalid because the Act 5 & 6 Will. IV. c. 54 was of universal obligation upon all British subjects domiciled in England, Ireland, or Wales, and the *lex loci contractus* could not prevail against this.

The Vice-Chancellor adopted this opinion, and declared that the marriage was not a valid marriage, and that all the real and personal estate of C. A. B. had become vested in the Crown. It does not appear that it occurred to any one to suggest that, so far at any rate as concerned the real estate, the question was to be determined solely by the *lex situs*[1].

The plaintiffs appealed to the Lords. Sir R. Bethell, A.-G., and Wickens for the Crown did now say, This is a purely English question, and arises in determining the right of succession to real and personal estate, the form and validity of the contract of marriage deciding the title by heirship. *Birtwhistle* v. *Vardill*[2] is, therefore, expressly applicable to this case. Then they continued the general argument, citing, towards the end, *Fenton* v. *Livingstone*[3]. Three of the Lords[4] who decided *Fenton* v. *Livingstone*[3] sat on this appeal also, but Lord St. Leonards alone, and he took no part in *Fenton* v. *Livingstone*[3], takes any notice of this special argument, saying, 'the question of the validity of the marriage will affect the right to real estate.' But his speech, as those of the others, is taken up with reasoning that the marriage was avoided by the statute and that the statute applied to British domiciled subjects even on their travels[5].

It may be objected, the marriage was accounted bad any way, and it was not necessary to go into the question about the real estate. But it must be remembered that this case itself is the first decision, as far as it goes, that the capacity to marry was to be regulated by the law of the domicil[6]. It is remarkable that the Attorney-General, the Solicitor-General, and Wickens arguing the case in the Vice-Chancellor's Court, are unable to cite one solitary English decision. They rely upon the opinions of foreign jurists and upon *Warrender* v. *Warrender*[7]. In the Lords—putting aside *Doe* v. *Vardill*, and some cases which they said showed that marriages within the prohibited degrees were void by the common law—they are no better off, citing *Simonin* v. *Mallac*[8], which had been decided in the meantime, only to distinguish it. This being so, it is extraordinary that the immoveable lawful wedlock argument should not have received more attention at the bar, in the opinion and judgment below, and in the Lords, if anyone had thought that there was really anything in it.

Turning to the Scotch case. *Fenton* v. *Livingstone*[9] was decided

[1] *Brook* v. *Brook*, 27 L. J. Ch. 401.
[2] 7 Cl. & F. 895.
[3] 3 Macq. 497.
[4] Campbell, Cranworth, and Wensleydale.
[5] *Brook* v. *Brook*, 9 H. L. C. 193.
[6] The judgment in the Lords was in 1860. *Mette* v. *Mette*, 28 L. J. P. 117, was decided in 1859, but was not cited or referred to.
[7] 2 Cl. & F. 488.
[8] 29 L. J. P. 97.
[9] 7 W. R. 671; 3 Macq. 497.

in 1859. The claimant asserted himself entitled to Scottish lands as 'heir lawfully procreate' under a Scottish entail. He was the child of a Scotsman and his deceased wife's sister, who, prior to the passing of 3 & 4 Will. IV. c. 54, had been married in England, where they were then domiciled. Both parents were dead, and the marriage had not been questioned in their lifetime. The Court of Session decided in favour of the claimant. On appeal, Lord Cranworth was content to say that the marriage was void in England, and that, even putting that aside, the law of Scotland prohibited it, and that prohibition attached to Scottish subjects wherever they went. Lord Wensleydale said the claimant must prove himself 'heir lawfully procreate.' When the claimant was not a native of the country in which the land was, then if legitimate by the law of his domicil, he would be legitimate by the local law. But if a marriage contravened a positive enactment, or was contrary to Scottish notions of religion or morality, it would be impossible to contend that it ought to be adopted in Scotland, and that the issue should be deemed legitimate for the purpose of succession to real estate. The marriage was void in England, and he assumed it to be a heinous crime in Scotland. Lord Brougham, since he objected to *Doe* v. *Vardill*, laid down, as he was wont to do in relation to *Lolley's* case[1], that it decided much more than it did decide, or than it has since been said by English Judges in an English Court to have decided[2], and so said very broadly that the *lex loci rei sitae* must prevail. But he also concluded that the marriage was an offence by the law of Scotland, and void in England. Lord Chelmsford spoke to much the same effect. The Court of Session had found only that the claimant was legitimate, and the case was remitted that that Court might find whether the marriage was good by the law of Scotland or no.

Since this marriage was void in the country of the place of celebration and of the domicil of both the parties, and since both the *lex loci rei sitae* and the *lex fori* stood in the way of the adoption of the rule of English law which, in the events which had happened, would have barred an enquiry into its validity in England[3], it was not necessary for Lords Brougham and Chelmsford to talk as they did at all; and further, they misapprehended *Doe* v. *Vardill*. Lord Cranworth's speech is rather in my favour, because he does not even notice this all prevailing *lex situs*. If Lord Wensleydale where he says 'for the purpose of succession to real estate' had said 'personal' estate, or for any

[1] *Russ. & Ry.* 237. See *Harvey* v. *Farnie*, 8 App. Ca. 43.
[2] *Re Goodman's Trusts, ubi supra.*
[3] *Beckford* v. *Wade*, 17 Ves. 87; *Don* v. *Lipmann*, 5 Cl. & F. 1.

purpose, it would not be easy, seeing that he was assuming this marriage to be a capital crime in Scotland, to show that he was saying ought wherein he differed greatly from the law of England[1]. But even if the case decides for Scotland all that it has been said to have decided, yet I claim that according to authorities having the force of law in this country a different view of the proper interpretation, extent, or application of the principle that the law of the locality governs the land prevails in this respect in England, and that, therefore, the opinions expressed by some of the Lords when giving judgment on the Scottish appeal cannot be held conclusive in this country[2]. Lastly, the speeches proceed to a very considerable extent on the opinions of Huberus and others; from such authorities as these I appeal to Savigny[3].

Is there anything in the general rules as to immoveables to compel that the validity of a marriage should ever be tried by the *lex situs*? Assuredly not. The law of the locality must rule the forms and solemnities of a transfer of immoveable property, the rights of alienating and limiting it, and, in the absence of any trust or contractual obligation, all questions as to its burdens and liabilities[4]. By what other law should these things be governed? There is really no conflict at all. But when it is said that the *lex situs* is to prevail, not to determine what is the effect of a status on land, but to determine whether the status exists or no, then I answer that the rule of obvious convenience which is well established as to such things as those above indicated lends no countenance to such a statement as this, and that the rules as to contract, the nearest analogy, though it is a false one, to marriage, point not indistinctly the other way[5].

There is this final consideration. Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage . . . . claiming *any real or personal estate situate in England*, may apply by petition to the Divorce Division of the High Court, praying that Court for a decree declaring that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage. The Court can then make such decree declaratory of the validity or invalidity of such

[1] *Hyde* v. *Hyde*, L. R. 1 P. & D. 130; *Re Bethell*, 38 Ch. D. 220; *Sottomayor* v. *De Barros*, 3 P. D. 1; S. C. 5 P. D. 94; *Brook* v. *Brook*, *ubi supra*, per Lord St. Leonards; *Roth* v. *Roth* (104 Ill. 35). 44 Amer. Rep. 81; *Reynolds* v. *U. S.* 98, U. S. 145.

[2] See *Ewing* v. *Orr Ewing*, 10 App. Ca. 453. 499.

[3] Guthrie's Translation, ed. 1880, pp. 137, 151.

[4] To go seriatim through the cases here would be to write a moderate sized book. See Westlake, c. viii; Selected Cases, 135–152.

[5] *Campbell* v. *Dent*, 2 Mo. P. C. 292; *Cood* v. *Cood*, 33 L. J. Ch. 273; *Norton* v. *Florence Land Co.*, 7 Ch. D. 332.

marriage as to the Court may seem just. No proceeding in this way will affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction[1]; but otherwise any such decree, unless subsequently proved to have been obtained by fraud or collusion, will be binding to all intents and purposes on Her Majesty, on every person cited or made a party to the proceedings[2], and on the heir at law or next of kin, or other real or personal representative of, and on any person deriving title under or through a person so cited or made a party[3].

A the petitioner claiming real and personal estate in England proves that the marriage of his father and mother was well constituted *secundum legem loci contractus*, and that there was no personal incapacity attaching upon either party by the law of their respective domicils. It is replied that the marriage would not have been valid if celebrated here and between persons domiciled in this country. Is the Court to declare that this marriage is both valid and invalid? If the Court decrees the marriage valid, then if *A* has taken care that the proper persons have been cited, who is to deny his claim to the real property[4]?

HORACE NELSON.

[1] *Shedden* v. *Att.-Gen.* 30 L. J. P. 217.
[2] *Brinkley* v. *Att.-Gen.* 14 P. D. 83.
[3] Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93).
[4] But see *Mansel* v. *Att.-Gen.*, 2 P. D. 265; 4 ib. 232.

THE LEGAL TEST OF LUNACY.

IT may well be doubted whether the legal profession itself is fully alive to the radical change which has passed over the old law as to the criteria of capacity and responsibility in mental disease during recent years. The object of the present paper is to set forth the chief incidents in this silent revolution as briefly and clearly as may be.

I.

The law as to the testamentary capacity of the insane, and the law as to their capacity to enter into the contract of marriage, have had practically the same history, and may therefore be considered together. In each of these departments we find three, and the same three, stages of development. At first, the question of capacity is treated solely as a question of fact, to be determined according to the ordinary rules of evidence. Then there comes an intermediate and metaphysical period, coincident in each case with a great advance in medical knowledge, and inspired by the idea—which was formulated as a definite external standard,—that, the mind being one and indivisible, and insanity being a disease of the mind, any derangement of the faculties must be fatal to civil capacity[1]. In recent years, however, the Courts have reverted to the old criterion, which did excellent duty before Lord Brougham came under the baneful influence of Dr. Ray, and each case of disputed capacity is once more decided upon its own merits, just as if the disturbing dicta in *Waring* v. *Waring* had never been promulgated.

II.

The law as to the capacity of the insane to enter into other contracts than that of marriage has had a curious and extremely complicated history, which it is hardly possible to write without error. Starting with the maxim of the Roman law—*furiosus autem stipulari non potest*—which was quite unsuited to a highly developed mercantile community such as ours, it turns aside, although not

[1] From the same postulates the American Courts tended at one time to draw a directly contrary conclusion, viz. that no impairment of reason short of absolute idiocy should be deemed fatal to testamentary power. Cp. the *Lispenard* case, 1841, 26 Wendell, 255, *contra* however *Delafield* v. *Parish*, 1862, 25 N. Y. 1. The English authorities are *Waring* v. *Waring*, 1848, 6 Moo. P. C. 341, and *Hancock* v. *Peaty*, 1867, 1 P. & D. 335.

with a very clear or certain current of authorities, towards the doctrine of Coke, that a man cannot be allowed to plead his own incapacity, and then wanders along through a number of exceptions and distinctions—'matters of record' and 'matters in pais,' 'contracts executed,' and 'contracts executory'—till it is arrested by the decision of the Court of Exchequer Chamber in *Molton* v. *Camroux* (2 Ex. 487, 4 Ex. 17, 18 L. J. Ex. 68, 356). At first sight nothing could seem more unpromising than an effort to trace any movement towards a simple test of capacity in a department of law whose course hitherto has been so much impeded by its history. But if we keep clearly in view the fact that insanity and lunacy or legal unsoundness of mind are not convertible terms, we shall find (1) that the historical difficulties above referred to are confined to the latter; (2) that it has nowhere been decided in recent years that the mere existence of mental disease vitiates contractual capacity; (3) that there are dicta which prepare the way for the decision in *Jenkins* v. *Morris* (L. R. 14 Ch. D. 674); and (4) that in the law of contract, as in the law testamentary and in the law of marriage, no man is counted a lunatic unless he is incapable of appreciating the nature, and of passing a rational judgment upon the results, of the particular act which is the subject of judicial consideration.

III.

Can the law of criminal responsibility in mental disease be fairly subjected to a similar analysis? It is not proposed to dwell here upon the vagaries of its history, how 'the wild beast theory' of Mr. Justice Tracy yielded to 'the general right and wrong theory' of Lord Mansfield, which was in turn supplanted by 'the rules in MacNaghten's case.' Nor do I mean to rehearse the well known criticisms on 'the rules,' which are associated with the names of Sir James Stephen and Dr. Henry Maudsley. Even the temptation to argue that the answers of the Judges not only are not, but from the very terms in which they are expressed were never intended to be law, must for the present be overcome. The question is, what standard of criminal responsibility is *now* applied in cases of alleged unsoundness of mind? Owing to the absence of any adequate provision in our law for the review of criminal cases by a Court of Appeal, we have no authoritative judgment upon the subject, to set side by side with such elaborate 'opinions' as that of Judge Somerville in *Parsons* v. *The State*. But every barrister who has gone on circuit knows that 'the rules in MacNaghten's case' are, avowedly, manipulated by Judges, and, if need be, defied by Juries, in order that injustice may not be done to the innumerable pri-

soners whose mental disease refuses to conform to any of the orthodox types which alone are nominally recognised by English law. Even the inebriate, the *voluntarius daemon* of Coke, who formerly had 'no privilege thereby, but what hurt or ill soever he doeth, his drunkenesse doth aggravate it,' is now held to come within the meaning of the rules in MacNaghten's case, and to be irresponsible if he did not know the nature and quality of his acts[1]. Loss of self-control, resulting from any disease of the mind, is in practice regarded as a valid exculpatory plea; and the abrupt question, *Could he help it?* in which Lord Bramwell is reported to have left to the Jury the determination of the sanity or insanity of Dove, though at variance with the theory of the criminal law, accurately represents the spirit of its administration at the present day.

It appears, therefore, that there is now no standard, external to individual conduct, for determining the capacity and the liability of the insane, and that the law knows but one test of lunacy, viz. 'Was the person whose act is in question able to understand its nature, and to pass a fairly rational judgment on its consequences to himself and others; and was he a free agent so far as that act was concerned?'

A. Wood Renton.

[1] Cp. the language attributed to Mr. Justice Day in *Reg.* v. *Baines*, Lancaster Assizes, The Times, 25th January, 1886; also a scholarly paper on 'Medical and Legal Preventives for Dipsomania,' by Professor Gairdner of Glasgow (Birmingham Medical Review, Jan. 1890).

THE MARITIME CONFERENCE AT WASHINGTON.

IN a paper read by Admiral Colomb, R.N., last March, at a meeting of the Institution of Naval Architects at the Society of Arts, he speaks of the 'wonder and pleasure' that it has given him to think of the few serious mistakes the recent Maritime Conference at Washington made, considering the nature of its constitution and of its work. Probably this feeling of relief, expressed by Admiral Colomb, has been shared by a good many others.

The results at which the Conference arrived will not be binding on anyone until they have received the endorsement of the various governments represented. It may therefore be of interest, at this stage, to call attention to some of the points debated, and to some of the resolutions passed on questions of vital interest to the seafaring population of all civilized countries. In such a paper as this it is only possible to deal with a few out of the many subjects debated, and with these only very shortly.

The delegates from eighteen maritime countries met at Washington on the 16th of October in last year. They were received by Mr. Blaine, the Secretary of State, who, in a graceful speech of welcome, alluded to 'the rapidly increasing intercourse between continent and continent, between nation and nation, which demands that every protection against the dangers of the sea and every guard for the safety of human life shall be provided.' Mr. Blaine went on to say that 'The spoken languages of the world will continue to be many, but necessity commands that the unspoken language of the sea shall be one.'

The first business meeting of the Conference was on the following day, and it was resolved to proceed at once with the discussion of the first division of the programme which had been prepared, and to consider, article by article, the Revised Regulations for preventing collisions at sea. It was these 'Rules of the Road,' as they are commonly called, that supplied the Conference with material, for by far the largest part of the work of discussion, which, to anyone who was not present, and perhaps to some who were, may seem very much out of proportion to the amendments that were carried, and to the changes actually made.

The general policy of the Conference in dealing with the Rules of the Road expressed in one of the reports issued by a committee appointed for purposes of revision and collocation, was 'to retain the text of the existing rules as far as it was feasible, to avoid un-

necessary repetitions, to use similar words or sentences for similar ideas, to make the articles as short as possible, and to group together all rules upon cognate subjects.' It was found much more easy to embody these excellent intentions in a head-note than to act up to them. Had they been carried out systematically, the work of the Conference would have been a model of arrangement and of careful drafting. Nobody can claim this for it. Admiral Colomb has given us what may be called the qualified form of consolation by saying that no one could expect from such a Conference 'conciseness' or the 'discarding of all that was non-essential, and the bringing out in firm, terse language, exactly what was wanted and no more.'

Although it was generally understood that merely verbal alterations were to be avoided as much as possible, the opening of the proceedings was marked by a proposal by the leading delegate from the United States, which led to striking out the word 'ship' altogether from the Rules, and the substitution of the word 'vessel' in its place. 'Vessel' has been defined in the Harbours, Docks, and Piers Clauses Act, 1847, and in the local Thames Rules, and 'ship' has been defined in the Merchant Shipping Act, 1854, and these definitions have been the subject of various decisions in English and American Courts. Although there is much to be said, from the logical point of view of the American delegate, for using the most comprehensive word when 'the whole class of marine structures' is meant, a good deal might be said, and much more than was said at the Conference, against cutting out of Rules of the Road intended to be learnt by heart and used constantly by sailors, the one word which they use most commonly, and substituting another which they rarely use. Many will think that the word 'ship' should be retained in the Rules, even at the price of an extra definition being added if necessary.

To begin with. The intention that rules on cognate subjects should be grouped together has been neglected in the very first rule of all headed 'preliminary,' which deals with the area of jurisdiction of the Rules, and runs as follows: 'These Rules shall be followed by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels.' Then, separated by twenty-nine rules, follows the cognate rule which should have been inserted here: 'Nothing in these Rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbour, river, or inland waters.' In regard to this, and to other cases where a want of drafting is conspicuous, Admiral Colomb's apology may be fairly quoted; but if drafting was impossible while the Conference was at work, it is

all the more necessary that it should be undertaken at a later stage, for if ever there was a case where simplicity, clearness, and precision were necessary, it is in a code of rules which are to be translated into a great number of different languages, and are to be used by seamen of every nationality of the civilized world.

If there was any part of the Rules of the Road which it was generally felt inexpedient to change, it was the 'steering and sailing rules.' They have been the subject of numberless decisions in the Courts, and their phraseology is so well known, and sanctioned by such long usage, that it seemed almost like sacrilege to touch them. Were it not for this reason, the existing 15th article providing for steamers meeting end on, with the three explanatory clauses attached to it, could not possibly have run the gauntlet of any conference determined to 'avoid unnecessary repetitions and to make the articles as short as possible.' To attach explanations to a rule is an admission that the rule is not worded clearly enough to do without them, and that it should therefore be re-cast; but to leave explanations which are clumsy and inordinately long, tacked on to a rule so badly framed as to need explanation, is not to do work, but to leave it undone. This is what has happened in the case of the existing 15th, left as a model of what a rule should not be.

Although the steering and sailing rules were left as far as possible unaltered, a new preliminary clause was added which affects all of them in an essential manner. Many members of the Conference felt the advisability of insisting on the importance of taking compass-bearings, and also that some attempt should be made to solve the old difficulty of deciding when risk of collision begins. A preliminary clause had been drawn up by the British Delegates in consultation, and was presented in print to every member of the Conference, together with other amendments. This clause, as originally drawn, ran as follows:—'Risk of collision may, for the purposes of these Rules, be deemed to exist when there is not absolute certainty that if the ships keep their respective courses and speeds they will pass clear of each other. Such risk can best be ascertained by carefully watching the compass-bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.' This clause was however seen to be too clearly an attempt to define the undefinable, and was modified before and during debate until, ultimately, it ran as follows:—'Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass-bearing of an approaching vessel. If the compass-bearing does not appreciably change, such risk should be deemed to exist.' In this form it passed the Conference. The importance of this clause arises from

the fact that as soon as 'risk of collision' is 'involved,' from that moment the steering and sailing rules come into operation. Indeed, according to recent decisions, the right construction of the steering and sailing rules is that they are to come into operation, and a ship is bound to manœuvre even before risk of collision is actually incurred, and in time to avoid it. Up to this time it has been agreed on all sides that Dr. Lushington was right in saying that it is impossible by any general rule to determine when risk of collision commences in each special case. The responsibility of determining this rests with the captain of the ship, who is to decide when it is advisable to manœuvre either to avoid collision or to provide against risk of it. Under the proposed new clause the same duty of manœuvring is incumbent on him, but he is now told for the first time that 'risk of collision should be deemed to exist' when the compass-bearing of an approaching vessel does not appreciably change. The objections to this clause are many. In the first place we have the expression 'approaching vessel,' which, standing alone as it does here, unqualified by the context, is very ambiguous. Is a vessel seven or eight miles away meeting another end on an 'approaching vessel'? If not, when does she become one within the meaning of the clause? Is a vessel nine or ten miles astern of another, and gradually overhauling her, an 'approaching vessel,' and is it really meant that 'risk of collision should be deemed to exist' as soon as it is observed that the compass-bearing between the two does not appreciably change? Such an expression as this, if finally adopted, will be the text for many a discussion in the Admiralty Courts. The words 'should be deemed to exist' are very suggestive. It is not that there is, or will be, a risk of collision which may be avoided, but that there is a fictitious risk of collision introduced into a set of rules which should deal clearly with facts, not obscurely with fictions. And it is very obscure, because by watching compass-bearings of approaching vessels which do not appreciably change, a captain may bring on this fictitious risk of collision sooner or later, just as he pleases; and perhaps the strangest part of the whole clause is that, although it was evidently intended to encourage sailors to take compass-bearings, it is so worded as to caution a captain who does not want to bring on a fictitious risk of collision against taking compass-bearings too soon or too often.

It ought not to be impossible to frame a rule ordering that compass-bearings of other ships should be taken without introducing any definition of risk of collision. Perhaps some such words as these would answer the purpose—'The compass-bearing of any vessel which appears to be approaching so as to involve risk of

collision should, when circumstances permit, be carefully watched. If it does not appreciably change, special caution is necessary.'

To show the effect of this 'preliminary clause,' let us take it in connection with one of the articles that follow—say, the newly-proposed 21st article—'Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.' Of two ships one is an overtaking ship gradually overhauling the other, but miles astern of her. The compass-bearing between the two is not appreciably changing, and 'risk of collision' is to be 'deemed to exist.' This brings the sailing and steering rules into operation. The leading ship happens to go dead slow for some passing obstruction. From that moment, if the 21st rule is to be obeyed, and she is to keep her speed, she may not go ahead again until the overtaking ship has passed clear of her. The confusion which would result in a crowded fairway from obedience to such rules as these can easily be imagined. It would practically stop navigation altogether.

The thirteenth of the existing Rules of the Road provides that every ship shall go at a moderate speed in fog, mist, or falling snow.

None of the Rules of the Road was more vigorously debated than this. It was shown to bristle with ambiguities, some of them intentional, and with difficulties, many of them unavoidable. Captains of various kinds of sailing and steamships had been asked by a member of the Conference what meaning they severally put upon the expression 'moderate speed'; and the answers varied according to the maximum speed of each ship. For instance, sixteen knots an hour was considered a 'moderate speed' for a vessel that could go twenty knots, and twelve knots an hour for a vessel that could go sixteen knots, and seven knots an hour for a vessel whose full speed was ten knots.

This was the kind of way in which some sailors have laid down a rough rule for their own guidance. Lawyers take an entirely different rule of construction of the expression 'moderate speed.'

In the Law Courts it has been held that if a vessel is going at such a speed that she cannot avoid another, that speed, whatever it may be, is not 'moderate.' And when a fog is so dense that it is impossible for a ship to see others in time to avoid them, she is not justified in being under way at all, except from necessity.

But if the question of what is or is not 'moderate speed' for any particular ship depends upon her power of avoiding another, then the complicated problem arises as to the effect of speed in steering a vessel, and at what point the diminished risk of a lower rate of speed is balanced by the increased risk of less control by the action of the rudder.

There is this further complication. A permanently reduced rate of speed generally means a reduction of steam pressure in the boilers, as there are reasons which make it unadvisable to run at a moderate speed under high pressure for any considerable time. But a low pressure of steam naturally weakens the reverse action of the engines and makes it as impossible to go full speed astern as full speed ahead, and this just at the critical moment, when a few yards less or more may make the whole difference between safety and destruction. With plenty of 'spare pressure' of steam in the boilers, a ship going slow can stop in a much shorter distance than when, with the same pressure, she is going full speed; but with every pound reduction of steam pressure the power to stop is also reduced, and the distance increased within which the ship can be brought to a standstill. The Conference was indebted to Admiral Bowden Smith of the British Navy for the record of some interesting experiments recently undertaken by the Admiralty in reference to this subject, and to Captain Sampson of the American Navy, who, in one of his terse and lucid speeches, supplemented them from his own practical experience and knowledge.

It is therefore a fact that a ship, by taking the precaution she is bound by law to take, of slowing down in thick weather (which no one suggests is an unnecessary one), incurs the double risk of being less under the control of her rudder and of her engines. It may be said that this is a sacrifice of her own safety necessary for that of other ships. This is by no means invariably true; for if reduction in speed has made a ship unable to steer easily, and reduction of steam pressure has made her unable to stop quickly, the result may be an end-on blow delivered by a vessel of several thousand tons going at a slow rate of speed, which is far more deadly than a side-long collision when she is going at a much higher rate of speed. If the captain of every big steamer had to think merely of the safety of his own ship, he probably would go full speed ahead in the thickest weather where he did not fear rocks or icebergs, trusting to his helm to avoid everything he could, and to his engines to smash through anything he could not. That this principle is too well understood by some captains was the confirmed opinion of certain members of the Conference, and found a grim expression in the formula quoted by one of them given him by the captain of an Atlantic liner, 'Heaven, Hell, or New York in seven days!'

There can be no denying the fact that enormous pressure is put upon shipowners and captains of ships by that large section of the travelling public, which grows larger every year, who, on a sea voyage, have only one desire, to get to the end of it as soon as possible.

There is, moreover, this additional element of selfish safety in speed in thick weather, that, as to be in a fog at sea is to be in danger, by shortening the time in a fog the danger is lessened. One day full speed in a fog on board a big steamer means perhaps less risk to those on board than two days in the same fog at half speed.

It was shown during the discussion on this thirteenth rule that 'moderate speed' meant a different rate of speed in a fair way, where many ships were navigating, from that which it might safely mean in the open sea, and that the way that a ship was built, and rigged, and whether she was light in ballast or heavily laden, together with many other circumstances, must all be considered in determining in certain cases whether her speed was 'moderate' or not.

It was practically admitted on all sides that to frame an exact rule suitable for every case was impossible, and, after a series of debates, in which hardly a word in the rule escaped discussion, the following was agreed to by the Conference:—

'Every vessel shall, in a fog, mist, falling snow or heavy rainstorms, go at a moderate speed, having careful regard to existing circumstances and conditions.'

This new clause was also added: 'A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

There has been a great increase to the bulk of the existing rules in those which provide for lights at night and sound signals in thick weather. The demand was irresistible, and the problem how to supply night signals and sound signals easily used and readily understood, for all the cases where they were required, was difficult enough to test the ingenuity of any man. It is impossible, within the limits of a short article, to enumerate the changes proposed, and the contingencies they are designed to meet. There can be little doubt that, when these rules have been through the chambers of a practised draftsman, they will gain in brevity and simplicity. To show the need of such a process it is enough to mention the fact that of sound signal blasts on the steam-whistle, siren, or fog-horn, there are five different kinds inserted in the proposed rules, namely, 'long blasts' undefined in length, 'prolonged blasts' defined in length, 'short blasts' undefined in length and 'short blasts' defined in length, and 'blasts' undefined in length. The difficulty of framing satisfactory sound signal rules was increased by the imperfection of the old-fashioned fog-horns, which are however being replaced by those of a better pattern. Some of the

rules for sound signals have been so worded as to leave it uncertain whether the signals are to be used cumulatively or singly. If cumulatively, they would, in certain cases, follow each other in such rapid succession as to lead to great confusion. In any case they should be so worded as to leave no doubt what is intended. In the process of drafting, probably every 'blast' would be either 'long' or 'short,' and a clause approximately defining the length of each kind of blast would be given, applicable to every sound signal used in the rules.

Special committees were appointed to investigate, and report to the Conference on most of the subjects which had been entered on the programme. These subjects may be divided into two classes—those on which it was considered that no common international action could be recommended, and, on the other hand, those which it was advisable to make the subject of international agreement. Among the former were questions relating to the construction, equipment, and inspection of vessels, and to the discipline and sufficiency of their crews. In regard to the proposal for a uniform load-mark, it was decided that 'notwithstanding the advantages which would be connected with the introduction of a uniform system of load-marks, this matter is not ripe for consideration by this Conference, and it ought to be left to the negotiations to be carried on between the governments of the maritime nations.'

Among the subjects recommended by the Conference for international agreement was the saving of life and property from shipwreck. The duty of each vessel, in case of a collision, to stay by the other vessel, and to help her if necessary, and, in all cases, to give her name and port of registry was acknowledged by a unanimous vote of the Conference, and is the subject of one of the fourteen resolutions put in an appendix to the Rules of the Road. The British Board of Trade rules for boats and appliances to be carried on board ship for saving life were generally recommended for adoption by all governments in the case of vessels of 150 tons and upwards, gross tonnage. The use of oil for calming a heavy sea is recommended, although it is admitted that 'there are conditions under which the action of breaking waves is not thereby much, if at all, modified.' Experiments have shown that in the open sea it is efficacious, but not nearly so much so in shallow water.

A uniform system of signals was laid down—lights by night and flags by day—to signal between a ship in distress and men on shore.

As regards colour-blindness, which has been so much discussed in the English Press, an opinion was passed that 'defective visual

power and colour-blindness are sources of danger at sea,' and it was recommended that tests should be applied for everyone intending to go to sea, and that 'no man or boy should be permitted to serve on board any vessel in the capacity of seaman, or where he will have to stand look-out, whose visual power is below one half normal, or who is red and green colour-blind.' The vested interests of captains and mates now holding appointments are safeguarded, and they are not to be obliged to submit to these tests.

A proposal that steamers plying in opposite directions between Europe and North America should be forced to keep to certain specified routes was rejected. But it was hoped that voluntary agreements of this kind would be entered into by the various steamship companies. For night-signalling a system of long and short flashes by white lights was considered as preferable to any system of coloured lights which cannot be seen so far as white lights.

The duties of one of the special sub-committees appointed were of a very multifarious kind. The following subjects were investigated and reported on by them: Warnings of approaching storms; Reporting, marking, and removing dangerous wrecks and obstructions to navigation; Notices of dangers to navigation; A uniform system of buoys and beacons.

Several days were spent in the discussion of these subjects, and in drawing up a report which could be unanimously adopted. The importance of uniformity and of simplicity is clear to every one, specially in such a matter as that of buoys and beacons, which should form a part of the common language of the Sea to be understood easily and used universally by sailors of every nationality. The difficulties in the way of getting one uniform system adopted by Governments, who have spent large sums in elaborating their own special systems, are very considerable, but, it is to be hoped, not insurmountable; and the Report submitted by the Committee and adopted by the Conference was a genuine attempt to arrive at a conclusion satisfactory to all countries, without imposing on any one too heavy a burden of change.

A large and representative Committee was appointed to examine and report on 'systems and devices' for saving life at sea. The number of inventive geniuses is considerable, and of those who try their hands at invention much larger; and the work of examining and sifting out what was of real practical value was a very heavy one. Their Report states that 'the Government of Chili has made the most liberal provision that the Committee has knowledge of for the safety of life on shipboard.'

The Committee did not however consider that the Chilian appliances could be universally adopted, however admirable they were

in themselves, and they recommend, as a basis for international agreement, the Rules of the British Board of Trade which were issued in March of this year.

The Conference has been described by some of its leading members as being the first of many which may be held hereafter as time goes on. Regarded in this way as the foundation for future work of a similar kind, its purpose and object may be said to have been fairly fulfilled. It suffered from the fate of many conferences. Towards the end, when most deliberation was required, there was a marked increase in the pace; and never was the old proverb more applicable—'More haste worse speed.' It was brought to a conclusion by a unanimous vote proposed by Sir Charles Hall, chief delegate for Great Britain, expressing the regard felt for the President, Admiral Franklin of the American Navy, by every member of the Conference, all of whom had appreciated his untiring patience and unvarying courtesy.

FREDERICK WILLIAM VERNEY.
(*Delegate for the Siamese Government.*)

A SONG OF USES,

The Old and the New.

I.

Magic wordes! ye, I wis, are a touchstone of noses
  Mete to discerne between hawk and hernshawe;
A limitless theme, that is more than red roses
  To monger of sonnet and rhyming gew-gaw;
Sage Gaius, a Mind that defies competition,
  Ne'er dreamt of that Maxim, so soothfast and true:
If the Land to the Feoffor reverts by Condition,
  He's in of the Olde Use and not of the New.

II.

Give ear, O ye Shades of Lycurgus and Moses!
  I rede ye a riddle the like ye ne'er saw;
('Tis a wonder how well your Lawmaker composes
  A Code without knowing a fragment of Law:
Nor Spartan nor Hebrewe had any suspicion
  Or hint of the things I unfold to their view:)
No Remainder is limited well on Condition,
  Which restores the Olde Use by destroying the New.

L'ENVOI.

Ye Poets! I'm sick of your vain repetition,
  Your Jenny and Jessamy, Sukey and Sue:
Be advised; and for Ballades suggesting vomition,
  Give us Sonnets of
Uses, the Olde and the New.

H. W. C.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A General View of the Criminal Law of England. By Sir James Fitzjames Stephen, K.C.S.I., D.C.L. Second Edition. London: Macmillan & Co. 1890. 8vo. ix and 399 pp.

1863 is the date of the first edition of Sir James Stephen's 'General View of the Criminal Law of England.' If anyone before that time wished to read an intelligible account of the subject, to what book could he have turned? Of technical manuals there were many, and some of them good. But they were indices rather than books, and they all assumed that the novice knew just what he most wanted to learn. One and all dealt with the subject as if it resembled heraldry or whist, and were a collection of artificial rules not corresponding to any facts in nature. One and all were uncritical; what was fanciful and what was rational were treated with the same respect; decisions were numbered, not weighed; and some scrap of curious learning dredged from the depths of the Modern Reports counted for as much in the living law of the land as a decision in the Court for Crown Cases Reserved not a fortnight old. It is significant that two years after the Consolidation Acts, which changed the face of criminal law, appeared the first text-book, which, so far as I know, any man of good sense could read with pleasure and profit. To lawyers it was not less instructive than to others. I only repeat what I have heard from the lips of men of eminence, that they owe to it incomparably more than to any other book on the subject.

To all intents and purposes this new edition is a new work. Scarcely a page is untouched. Much matter about the laws of evidence has been omitted; it did not exclusively relate to criminal law; and some chapters dealt with questions in which interest has died out. The weak side of the first edition was the historical. In 1863 the influence of Bentham was nearer and greater than it is; people then cared much less than they do now for that element. Of the history of the development of the whole body of criminal law out of a few crude, casual ingredients, most of us will find here all we are curious to know. The supreme value of the book is not in the narrative of the growth of English law, the fullness and lucidity of the exposition, or the acute, terse observations in every page, but in the living knowledge of the subject which it displays. Experience of thirty-six years as a barrister, legislative member of the Indian Council, legal author, a draftsman of important measures affecting criminal law, and as a judge, has gone to the production of this volume; no less would have sufficed. In every page the author writes with an enviable sense of proportion, a perception of what is living and what is obsolete, what is growing and what is unimportant. In some excellent text-books the whole law as to challenges is described as if it were a matter of course for counsel to exhaust their challenges; here it receives the limited attention which in practice it merits.

There are books which mention official informations at the instance of the Attorney-General as if it were a regular and frequent mode of procedure. No one would gather from them that this method had fallen into disuse, and that the last case in which he used his constitutional power was many years ago—in relation, if I mistake not, to certain corrupt practices. Let me mention another illustration of the false impressions conveyed by failing to distinguish between the letter of the law and the mode in which it is administered. The hardships of prisoners before the Prisoners' Defence Act of 1836 are often inadvertently exaggerated. Hardships there were; but they were lessened by a license, recognised in Courts, though not in books, which counsel cross-examining in the interest of the defendant enjoyed. He was allowed to put his questions with great freedom, and often they took the form of short speeches. Some barristers were famous for their skill in the art of stating their points while they examined. I have before me the short-hand notes of a case in which Charles Phillips defended. He did not make one set address to the Jury; he made, unreproved by Parke and Gaselee, a score of short, pithy speeches. The difference between a guide-book, the outcome of one hurried journey, and that written by one who has traversed on foot many times every mile of the country described, is not greater than the difference between this volume, the record of a lifetime of strenuous labour, and the mass of legal works.

In 1863 the writer was feeling his way in regard to many problems; his solutions were sometimes imperfect. His account in the first edition of conspiracy, for example, was vague and unsatisfactory as compared with that to be found in these pages. Half-a-dozen sentences give a clear idea of the stumbling-block of English criminal law, 'malice' and 'malicious.' If there be a better exposition it is in Mr. Justice Stephen's own judgment in *Regina* v. *Tolson*. It is often said that the law makes no progress; let those who think so compare the terse and clear exposition of malice in this volume with explanations of it by the masters of the common law forty years earlier—say Bayley J. or Littledale J.—and then ask themselves whether they are right. There is scarcely a sentence in this volume which I would presume to criticise; where doubts have presented themselves, the probability is that they are baseless. But is this account of the preliminary steps towards crime entirely satisfactory?

'The exact period at which they become criminal cannot, in the nature of things, be precisely ascertained, nor is it desirable that such a matter should be made the subject of great precision. There is more harm than good in telling people precisely how far they may go without risking punishment in the pursuit of unlawful objects.'

Is the dictum conclusive and convincing? In a scientific point of view, is not the complete uncertainty in regard to this subject a reproach to English law, and is it wholly a necessity? Much of the learning in German legal works on the subject of 'incomplete offences' is more curious than instructive. In English text-books the state of things is still worse, as the Courts will find when the question thus summarily dismissed comes before them.

The common law as to crimes may have nearly attained its final stage of development. Anyone who reflects upon the questions coming before the Court for Crown Cases Reserved for the last ten years, must note the rarity in which they turn upon doctrines of common law, and the frequency with which they relate to particular statutes. The interest in the former may decline; while it exists, this book is likely to keep its unique place. The very foundations of criminal law are now the subjects of dispute as they

never before were; Lombroso and pupils of his school question all the ordinary theories of punishment and responsibility. This book makes no express mention of these modern controversies; but its readers will have little to learn from the author of *L'Uomo Delinquente.*

JOHN MACDONELL.

[We understand that the newest Italian school has not succeeded in gaining much practical importance in its own country.]

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH. Tenth Edition. Edited by JOHN MACDONELL, assisted by GEORGE HUMPHREYS. London: Stevens & Sons; Sweet & Maxwell. 1890. Royal 8vo. 2 vols. lxxxiv and 1290 pp.

THIS well-known work has after nearly thirteen years reached another edition, marked by the advent of a new editor in chief and by considerable changes in form. It was originally published by Mr. John William Smith in 1834; but the third edition, which appeared in 1843, was the last he supervised, and Mr. G. M. Dowdeswell, the late Official Referee, then became its editor and was responsible for subsequent editions down to the ninth, published in 1877; now Master Macdonell appears as editor, assisted by Mr. George Humphreys, the literary record of both gentlemen being such as to justify most favourable expectations of their work. Though 'Smith's Mercantile Law' can as yet boast no Judges among its editors, it has contrived to reach its tenth edition in 66 years from publication, while the rival work of its author, 'Smith's Leading Cases,' now published 62 years, and with the advantage of the editorship of Mr. Justice Willes and Mr. Justice Keating, is at present only in its ninth edition. The present issue is in two volumes instead of one, and shows considerable increase in size. The edition of 1843, the last revised by Mr. Smith, contained 693 octavo pages of text, and 274 pages of statutes; the edition of 1877, the last revised by Mr. Dowdeswell, showed 696 royal octavo pages of text and 297 pages of statutes, while the present edition is composed of 795 pages of text and 430 of statutes, an increase in all of some 230 pages on the preceding edition.

When a work has reached its tenth edition it is perhaps too late to ask whether it meets a want. It obviously does; but we confess ourselves puzzled as to the class of persons who use the work before us. They can hardly be practising barristers. When a practising barrister has a point of company law to consider, he goes to Buckley or Chadwick Healey, not to the 57 pages of Smith which deal with joint stock companies; on partnership he will prefer the volumes of Lindley to the 49 pages of Smith. He will hardly consult the 97 pages on marine insurance in the work under review, when the two volumes of Arnould or Phillips are open to him, and he can hardly hesitate to choose between the 70 pages devoted to the contract of sale by this edition, and the exhaustive and authoritative work of Benjamin. That the work is not intended for the practising solicitor in the country seems clear from the fact that references are only given to one series of reports, and from the character of the treatise, which by its compression and necessary failure to refer to the individual character of the numerous cases it cites renders it difficult to apply its rules to the details of any particular transaction. The price seems to put it beyond the reach of students, and the many authorities referred to are *caviare* to the layman,

who moreover will hardly recognise many of the statements in the book as to commercial practice as having any reference to the commercial world with which he is acquainted. The present editor's preface indeed suggests a class of readers; he says:—'From no other text-book of modern times have judges oftener avowedly taken expositions of the law. Still more frequent are the instances in which important passages in judgments are paraphrases of this compendium.' We should like to hear the learned editor compelled to justify this statement as against the rival claims of say, Benjamin on Sale, Arnould on Marine Insurance, Abbott on Shipping, or Lindley on Partnership; but assuming that the editor has blown his author's trumpet not only loudly, but accurately, and admitting at once that several of Her Majesty's Judges would be better for a perusal of Smith's Mercantile Law, the continued demand of the whole bench of Judges would not send a book into its tenth edition.

A careful study of the work in detail has increased our difficulty. We have endeavoured to select a part of the book for minute criticism which would test both the original work and the new editors, and we have chosen the chapter on the contract of affreightment. This contained 43 pages in the last edition, and in the present one covers 72 pages, so that to the parent work the editors have added some 30 pages of original matter. We have carefully tested this section, and compared it with the editions of 1843 and 1877, and we regret that we cannot honestly praise it.

In the first place there is an entire absence of any order or method in dealing with the subject. A late distinguished Judge is reported to have asked for his facts in alphabetical order, if counsel could not assist him with any other; but even the alphabet has not brought some sort of order into the chaos of Mr. Smith and his editors. The chapter on affreightment starts with a division as follows: —'1. Contract of affreightment by charter-party. 2. Contract for conveyance in a general ship. 3. Duties of masters and owners. 4. Duties of merchant. 5. General average. 6. Salvage.' This division has come down from the earlier editions, except that until the last edition a short section on 'Dissolution of contracts of affreightment' was added, which has now disappeared. We may shortly dismiss the sections on general average and salvage by saying that general average is so technical and so entirely in the hands of average adjusters, to whom the work before us will be useless, that it might have been omitted with safety; and that the section on salvage contains a considerable amount of matter which has nothing to do with the contract of affreightment at all. But take the remaining divisions; and it is as far as our experience goes quite impossible to discover any reason why any particular matter should be treated under one or the other. Take, for instance, 'demurrage;' under which head should it appear? It clearly may relate to charter-parties, or to bills of lading, or to duties of the merchant; thus establishing a claim to be in three out of the four divisions. The reader will find some three pages devoted to the subject in the section on charter-parties, a portion of which is curiously enough occupied with remarks on demurrage under a bill of lading; he will also find a few incidental remarks on the relation of the bill of lading to the charter in the section on bills of lading. In the section on the duties of master and owner he will find the duty of the consignee to discharge in reasonable time; a surprise for which he will be compensated by discovering in the section on duties of the merchant a dissertation on the duties of the master and owner in respect to goods left on their hands. And in the same section he will again find the question of demurrage treated in two different parts. The seeker for a point of demurrage law

will therefore collect his materials from five different places scattered over the 80 pages, and he will find the duty to load or discharge in reasonable time in the absence of express stipulations reiterated at pages 330, 360, and 367. Surely it would be simpler and more convenient to make 'demurrage' one short section under which all this scattered and reduplicated matter could be collected and condensed, with great gain of clearness and saving of time.

Again, take the important question of 'excepted perils;' which of the divisions of the chapter they should logically come under we should not like to have to decide. As a matter of fact they first appear in the section on charter-parties, casually and unexpectedly, with a remark about 'restraint of princes;' 'perils of the sea' come next, with a quotation from Lord Herschell in *The Xantho* as to their meaning on a policy of marine insurance; but the reader has to wait a page and interview the celebrated rat of *Hamilton* v. *Pandorf* and the question of negligence of the shipowner, before he gets to the statement that 'dangers and accidents of the sea' 'seem in theory' to mean the same in the contract of affreightment and a policy of insurance, and there after about forty lines of print and a quotation the subject drops. Though bills of lading are usually supposed to contain 'excepted perils,' the expectant reader will not find them mentioned in that section. But they appear again 32 pages on in the section on duties of the master and owner, illustrated by a reference to a bill of lading which appeared in the edition of 1843, and has continued in each edition down to the present, regardless of the fact that it is now only used by casual sailing vessels, and that the bill of lading under which most English goods are carried is a much lengthier document and very different in its legal aspects. Then there appears the rat again, one mention of him not sufficing. Next follows a quotation from Willes J., with a reference in a footnote to *The Xantho*, and a remarkable statement that 'damage in consequence of a collision from negligence or barratry of the crew . . . are (*sic*) not within the exceptions.' *The* exceptions presumably mean those of the sailing-ship bill of lading in 1843, but why the editors should trouble to tell their readers this without hinting that a large number of bills of lading now contain an exception of negligence of the master, and a still larger number the exception of barratry, is not apparent. And there the treatment of exceptions ends, occupying in all some four pages. We cannot find any statement of the relation of excepted perils to the contracts implied in the contract of affreightment; there is no discussion worthy the name on the effect of what are now the leading cases on the subject, *The Xantho* and *Hamilton* v. *Pandorf* (both reported in 12 Appeal Cases), and there is as far as we can see no recognition of the fact that the majority of modern shipowners endeavour by their bill of lading to protect themselves against every possible source of liability for damage to the goods they carry. We cannot doubt that if Messrs. Macdonell and Humphreys had to write for the first time an account of the position of exceptions in the contract of affreightment they would produce a very different result from the unscientific, scattered, and inadequate treatment of the subject in the work under review.

The editors may indeed reply that they are hampered by the text of their author, which has been approved by nine editions, and should not be lightly altered; and Mr. Macdonell has according to his preface endeavoured 'to alter the work according to the plan of the author.' But there seems hardly sufficient sanctity even in a plan laid down by Mr. John William Smith to prevent subsequent editors from freely revising his

pages so as to collect the law on one subject at one place, instead of having it in three or four. For instance at page 336 we find the isolated statement in a paragraph all by itself: 'The charterer is bound to name a safe port for the discharge of the vessel.' This is of course untrue. If the port is named in the charter, it is immaterial whether it is safe or not; we doubt even if under a charter to 'proceed to a port as ordered,' there is any implied warranty of safety, and both the cases cited by the editors[1], (for this passage is not found in the ninth edition), refer to charters to proceed 'to a safe port as ordered,' which is a very different thing. But forty pages later on, at p. 380, the same subject turns up again, also inserted by the present editors. It is introduced by a curious remark, 'Space does not permit stating the other duties of the charterer, but it may be mentioned that—' and then follow certain matters which the editors have apparently forgotten to introduce elsewhere. At least that seems the only explanation of the fact that *Nelson* v. *Dahl* (6 App. C. 38) is not noted where we should expect to find it under the clause 'so near as she may safely get' at p. 328, but is put in this final receptacle for miscellanies. However, among the collection there appears the statement: 'The port named must be safe having regard to the vessel and the cargo;' and two cases are cited, *The Alhambra* (6 P. D. 68), which had been cited before, and *Allen* v. *Coltart* (11 Q. B. D. 782). What the latter case has to do with the statement to vouch which it is cited, we suspect the editors will be puzzled to explain, and we cannot see any appropriate footnote near from which it has wandered. In this case an inaccurate statement is made in two different places, where one would suffice even for an accurate one; it is vouched for by the citation of one irrelevant and two misleading cases; and *The Teutonia* (L. R. 4 P. C. 171), which is a leading case on the term 'safe port,' is not referred to. The present editors alone are responsible for this; and some other introductions of theirs appear equally unsatisfactory.

For instance, in previous editions, the consideration of those terms of a charter the fulfilment of which is a condition precedent to its validity, had been relegated to a note. The present editors have treated this question in the text, but in a curious way. They say (p. 326): 'The provisions of the charter-party consist of either conditions precedent or substantive parts of the agreement, the breach of which by one party entitles the other to rescind the contract, or representations or collateral promises, the breach of which gives rise to a cause of action, and a right to damages.' Without disputing that there is such a division, surely the terminology is of the oddest. For instance, what is a clause providing that the charterer shall pay demurrage? It is not a 'representation;' it seems rather misleading to call it a 'collateral promise,' which implies something outside the charter; and it is a 'substantive part of the agreement,' though its breach does not give a right to rescind. We question whether the sentence quoted throws any light on the subject at all. And without further discussing the eighteen lines devoted to the matter, why did the editors leave standing ten pages further on, at p. 335, a page setting out two cases on conditions precedent, a relic of the old edition which should have been transferred to the new matter inserted at p. 326?

We had noted a large number of other faults of arrangement, and misleading statements, but space fails us to refer to them all. It is odd that the two definitions of charter-parties given at p. 322 should neither of them include time charters. We should at least expect to find the statement at

[1] *Smith* v. *Dart*, 14 Q. B. D. 105; *The Alhambra*, 6 P. D. 68.

p. 326, 'that as a rule the law of the flag of the ship shall regulate the construction of shipping documents,' qualified by an express reference to the apparently contradictory judgment of the Court of Appeal in the Missouri case (42 Ch. D. 321), which, by the way, is only cited from the Weekly Reporter, though it was printed in the Law Reports by November, 1889, and Mr. Macdonell's preface is dated February, 1890, cases as late as the January Law Reports being referred to in the Addenda. The statement at p. 339 as to the course of business with mate's receipts and bills of lading is quite inaccurate as regards the port of London, and many other large ports. *Lickbarrow* v. *Mason*, on p. 346, should not be cited without a reference to its commentary, *Sewell* v. *Burdick* in 10 App. C. In the discussion of seaworthiness, we should expect to find some note of that important branch of the warranty known as cargo-worthiness exemplified in *Tattersall* v. *National SS. Co.*, 12 Q. B. D. 297; and of the common form of exemption from the warranty shown in *The Laertes*, 12 P. D. 187. We doubt whether 'the custom of the river Thames' alleged at p. 360, on the authority of cases decided in 1792 and 1805, has any existence in 1890. It is worse than useless gravely to cite as applicable to the present day cases decided at a time when the dock system was non-existent, and ships discharged in the river. The statement at p. 368, that advance freight is irrecoverable though the ship and goods are lost, is untrue, if the loss is not caused by excepted perils (see *G. I. Pen. R. Co.* v. *Turnbull*, 53 L. T. 325), or if the ship was not sea-worthy or did not start in a reasonable time (*Ex parte Nyholm*, 29 L. T. 634). We should expect to find a definition at the same place of 'lump freight;' and the statement that in a lump sum charter, 'if the vessel were to lose part of her cargo, it has been doubted whether freight would be payable for the remainder' might surely be revised with reference to the cases of *The Norway* (3 Moore P. C. N. S. 245); *Robinson* v. *Knights* (L. R. 8 C. P. 465); *Merchant Shipping Co.* v. *Armitage* (L. R. 9 Q. B. 99); which are not referred to, but which all deal with the question.

We have not nearly exhausted the criticisms to be made on this section of the work; its faults are absence of arrangement, inaccuracy of statement, and failure to revise judiciously both the law and the practice therein stated, with regard to the changed conditions of commerce. While we have not examined the rest of the work with equal care, from what has been examined, there seems no reason to consider the section on the contract of affreightment an unfavourable specimen of the work. It is certainly surprising to find in a work published in February, 1890, which cites cases as late as January, 1890, not a line of reference to *Derry* v. *Peek*, decided in the House of Lords on July 1, 1889, reported at length in the Times of the following day, and in the Law Reports in August, 1889, and this is the more surprising as the case is twice cited in the Court of Appeal. As appears from the preceding criticism, the additions and revision of the new editors are equally at fault with the old text; that the new editors were able to do a great deal better than this we cannot doubt, and we can only suppose that the numerous occupations to which the editor refers in his preface have prevented a better edition being prepared. It is to be regretted under these circumstances that it was thought necessary to prepare one at all.

It is a relief after so much unfavourable criticism, to speak with unhesitating praise of one feature of the book, the new introduction on the History of Mercantile Law, contributed by Mr. Macdonell. No doubt this history has yet to be written; it is doubtful even whether the materials for a history of the subject-matter of Mercantile Law as distinguished from

the manner of its development exist. The fairs where disputes arising in the fair were decided summarily by the courts *piepoudre*, while the dust was still on the feet; the courts in seaport towns, which decided the pleas which 'yoven to the law maryne, . . . for straunge marynerys passaunt, and for hem that abydene not but her tyde' (which) 'shuldene be pleted from tyde to tyde[1],' were too busy to preserve records of their proceedings. It was then recognised, as it ought to be now, that merchants *celerem debent habere justitiam*[2], and the swiftness and efficacy of these courts has not left many records of the law therein administered. Some of the steps however by which the law of merchants administered by special tribunals, binding on a special class, and founded on the practice of merchants of all countries, became administered by the ordinary tribunals, binding on all subjects of the Queen, and flowing from the common sources of law in England can be traced, and this Mr. Macdonell has done admirably. We should have liked a little further exemplification of the great services of Lord Mansfield, truly as was said by Buller J.[3], 'the founder of the Commercial Law of this country,' in the sense that he based it on commercial usage and moulded it on principle. There can be no better training in Mercantile Law for the young student than a course of the judgments of Lord Mansfield as reported in the pages of Burrows and Douglas. But one cannot have everything in twenty pages of introduction, and it is ungracious to grumble at a new and admirable piece of work. The only drawback to its excellence is the regret that the editor, who is capable of it, should be responsible for so unsatisfactory a text.

The Criminal. By Havelock Ellis. London: Walter Scott. 1890. 337 pp.

This is an ably written, an instructive and a most entertaining book. The author's theory of criminality may be stated very briefly. After we eliminate from the criminal classes the political offender, the victim to sudden and yet not unaccountable passion, and the lunatic, there still remains the instinctive criminal, whom Mr. Ellis, translating the 'l' uomo delinquente' of Italian anthropological literature, describes as 'the criminal man,' and to whom his argument is confined. The members of this class are, according to Mr. Ellis, in their physical characteristics, and in their utter moral insensibility, idiots. Whence follows the strictly logical conclusion that their treatment should be curative and not punitive. Our criminal law sets the results of anthropological research at defiance. In addition to the original sin of being the lineal descendant of that savage code which hanged lunatics — under the best medical advice of the day—it has committed innumerable actual transgressions, stedfastly regarding the offence and not the varying nature of the offender, predetermining the duration of punishments, and sternly condemning as criminal every action which fell beyond its own arbitrary definition of what is insane. Equally unsatisfactory is our prison system, which is simply a manufactory of lunatics and criminals. All these defects must and can be remedied. 'Progress in penal jurisprudence lies in giving consideration to the man.' The duration of punishments should be indefinite, depending on the success of the curative treatment put in force during the seclusion of the criminal (a suggestion, by the way, made long ago by Sir Henry Taylor without reference to any medical theory). Flogging

[1] Domesday Book of Ipswich. [2] Bracton, f. 334.
[3] *Lickbarrow* v. *Mason*, 2 T. R. 73.

and capital punishment should be abolished. Prison life should be active and social, not a mere purposeless routine. The medical expert should be an assessor and not a witness. Such are the leading points in Mr. Ellis's argument. The criticisms to which in some respects it might legitimately give rise are obvious. But the work as a whole is original and suggestive, and deserves the consideration which it will doubtless receive. A glossary of the chief medical and psychological terms used throughout the volume would add distinctly to the value of a second edition. It is simply barbarous to hurl at a lay reader such a sentence as the following (p. 52): 'Lombroso, when he examined the skull of Gasparone, a famous brigand of the beginning of the century, whose name still lives in legends and poems, found microcephaly of the frontal region, a wormian bone, eurigmatism, increase in the orbital capacity, oxycephaly, and extreme dolichocephaly.'

A. Wood Renton.

The Law of Charities and Mortmain, being a third edition of Tudor's Charitable Trusts. By L. S. Bristowe and W. I. Cook. London: Reeves & Turner. 1889. La. 8vo. xcvi and 1048 pp.

This book is divisible into three parts; the first, consisting of 370 pages, covers in general the same ground as the text of the last edition of Tudor's Charitable Trusts; the second, extending to p. 444, comprises the Mortmain Act, 1888, with an introduction and notes; and the third, extending to p. 870, includes the matters comprised in Mr. Mitcheson's recent work, namely the Charity Commission Acts, with an introduction and notes, and the forms used by the Charity Commissioners.

Throughout the book we observe that the editors have taken great pains in searching all the reports for charity cases, and they have thus noticed a good many which had been overlooked by previous writers. They give also references to all the reports in their list of cases, and a very full table of contents and a copious index.

It appears to us that the editors have been less happy in their mode of dealing with their cases, after they have collected them, and that their modes of arranging the divisions of the subject and stating the results of the cases leave much that could be desired. The Georgian Mortmain Act (9 Geo. 2, c. 36), and the Acts amending it, and the doctrines of impure personalty and secret trusts deserved separate chapters or sections. But we find them all combined in notes on the fourth section of the Mortmain Act of 1888. In the chapter on Superstitious Uses we find a reproduction of the mistake made by Mr. Tudor in confusing together superstitious trusts and forbidden religious trusts. In the sections on the *cyprès* doctrine, we find cases introduced which are not instances of it, but merely show what effect will be given to certain general words, or illustrate the rule that a trust shall not fail for default of a trustee. And on almost all points we find too great an inclination to refer everything to the general doctrine of intention without discriminating the rules to be derived from the decisions as guides to the intention in particular cases.

The result is that many of the statements of law require considerable qualification, e. g. (pp. 40 and 140) that the *cyprès* doctrine is applied where an institution, to which a bequest is given, has ceased to exist, (pp. 36 and 140) that charitable gifts expressed in indefinite terms are applied *cyprès*, and (p. 109) that property impressed with a perpetual charitable trust can never revert. And there are some grosser slips, as on p. 441, where we are told that a dictum of Arden M.R. on the custom of London will be

found in a case which was a decision of Lord Thurlow's, having no bearing upon the subject.

The book, however, comprises a vast amount of matter and will be useful as a work of reference, though it will be necessary to exercise some caution in relying on the conclusions enunciated in it.

A. D. Tyssen.

A Treatise on International Law. By William Edward Hall. Third Edition. Oxford: Clarendon Press. 1890. 8vo. xxviii and 788 pp.

It might be unjust to the original merits of Mr. Hall's work to say that he has made it a materially better book than it was at first. But he has certainly made it more useful. It has established itself as the one concise and practical English treatise on a subject which has suffered perhaps more than any other in the whole range of jurisprudence from diffuse and irrelevant writing. In the preface to this edition Mr. Hall has a shrewd forecast of the next stage of the development of the law of nations. The next European war will be on a great scale, and whether it be long or short, there is great reason to fear that it will be a wide-spread, a hard, and a bitter one. There is great risk of passion being too much for rule and justice; and unhappily there is already plenty of evidence that passion will never be at a loss for more or less plausible sophistry to make its worse reason appear the better. Mr. Hall's sayings are not smooth. Of course it would be much more agreeable to listen to the people who talk of universal peace and arbitration, in the face of a nation of eighty millions of men armed to the teeth under an irresponsible and unaccountable government, which may at any moment find the hazard of foreign war less than that of revolution at home, or may be displaced by explosive forces not more likely to confine their operation within their own frontiers than were those of the French Revolution. But we fear that men of sense, while welcoming everything that makes for peace, must assent to Mr. Hall with some such words as those of Mr. Pepys: 'A devilish saying, but true.' Mr. Hall has one topic of consolation for us. 'There can be very little doubt that if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law . . . it is a matter of experience that times in which international law has been seriously disregarded have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged.' Meanwhile it would be well, as Mr. Hall points out elsewhere, if British naval officers were not encouraged to simulate, in the course of peace manœuvres, operations against undefended coast towns which are certainly contrary to the law of nations, and would probably be found anything but wise or profitable in the long run by a nation which indulged in them in actual warfare. The only material alteration in Mr. Hall's text to which we need call attention is on the subject of pacific blockade. His objections to this practice have been overcome by the recent example of its effective use in the case of Greece in 1886.

The Modern Law of Railways, as determined by the Courts and Statutes of England and the United States. By Charles Fisk Beach, junior. San Francisco: Bancroft-Whitney Company. 1890. 2 vols. La. 8vo. xlv and 1544 pp.

This pair of volumes, of a size unknown to the English law-publisher, presents several features of interest to an English lawyer. Mr. Beach

writes primarily as an American railway lawyer, and for American railway lawyers; both the titles and the matter of some of his chapters are foreign to English law. The Law of International State Commerce does not sound akin to English legislation, but seems not unlike the English Act of 1888, under which Lord Balfour of Burleigh and Mr. Boyle have been wrestling with the difficulties of schedules of rates for goods. Receivers for railways and the foreclosure of railway mortgages do not appeal to the English barrister, unless he is a speculator in American railway bonds and shares. We do not appear to have got so far as our cousins in the States in grappling with the mysteries of the 'Long and Short Haul:' but still a good deal of the work before us is familiar to the English legal mind. English authorities are cited with praiseworthy frequency; for instance, in the first section; 'on Promoters,' we find three American and three English authorities referred to, amongst the latter being the well-known judgment of Lindley J. in *Emma Mine* v. *Lewis* (L. R. 4 C. P. D. 396); and throughout the work we find English decisions and English legislation compared with the railway law and the railway developments of the United States. The section on Rescission of contracts and Fraud was written before the judgment of the House of Lords in *Derry* v. *Peek* (14 App. C. 337), and it does not appear whether Mr. Beach would approve of that much discussed judgment or not. The work is naturally addressed to an American audience, and seems likely to be useful there; it cannot fail however to be also both interesting and instructive to those of their English brethren whose practice lies in the lucrative paths of railway law.

An Outline of the Law of Property By Thomas Raleigh. Oxford: Clarendon Press. 1890. 8vo. 147 pp.

The author states his object in the words following:—'The following pages have been written with an exclusive regard to the needs of those who are beginning the study of English law. I have endeavoured to give, in language as simple as may be, an outline of the Law of Property as it now stands, introducing only so much history as is absolutely necessary for the explanation of existing rules. My work is not meant to take the place of any existing text-book, but rather to supply those initial explanations for want of which even the elementary books may prove unintelligible to the beginner.'

The author possesses great qualifications for his task. It is impossible to read his book without seeing that he is a very able man, that he has a considerable knowledge of law, and that he writes charming English. In spite of this, we consider the book unfit for the use of beginners, unless supplemented by careful oral instruction.

In some cases the author uses technical words without explaining them, e. g. 'consideration,' p. 57, 'inquisition,' p. 28, 'Jus in re, jus ad rem,' p. 13, 'private law,' p. 22, 'transferred into Court,' p. 28; in some cases the explanation follows the use of the word after a long interval, e. g. 'tenant' of copyholds, p. 39, explained p. 102, 'remainder,' p. 22, explained p. 88; in other cases he gives inadequate explanations, e. g. in his explanation of the Statute of Uses he neglects to state and comment on the words which take the seisin out of the grantee to uses, p. 14.

The book is disfigured by inaccuracies, e. g. 'Every corporation sole . . . . has a corporate seal,' p. 40: surely the author does not think that a parson has a corporate seal. 'Custom' used for 'law,' p. 71. 'If land is granted to *A* in trust for *B* and his heirs, *B* is an equitable owner in fee simple,' p. 92. Here the inaccuracy is twofold. *First*, if *A* took and retained the legal

estate, *B* would only take an equitable estate *pur autre vie*; *secondly*, under the limitation stated, *B* takes the legal estate by virtue of the Statute of Uses. The effect of registration of a writ under 51 & 52 Vict. c. 51 does not depend upon notice, p. 130.

There is, however, a great deal that is good in this book: the manner of stating the cases cited is nearly perfect; the explanation of Pawn, Lien and Mortgage, p. 130, is excellent, being at once lucid and concise. As a manual for teachers who are themselves fairly good lawyers it will be valuable.

[We know another man who wrote a plain and concise book on a similar subject. He took the precaution of submitting the proof-sheets to two very learned friends. And, what was more, those learned friends read them. Yet the book, when it came out, contained a flagrant mistake in an elementary point, which wholly escaped notice until a second edition was nearly through the press, and then got corrected at the eleventh hour. Let none of us think he standeth. Flaubert, the most terribly just of men of letters, made some way in collecting a museum of the blunders and imbecilities of great writers.—Ed.]

The Law of Support and Subsidence. By Harry Lushington Stephen. London: Butterworths. 1890. 8vo. xix and 96 pp.

This is a useful little monograph. The author distinguishes very clearly between the right of the owner of land in its natural condition to support from his neighbour's land, and his right to support, when he has by building added some thing to the weight of his land, the former being, and the latter not being, an easement. This distinction becomes of importance, if owing to excavations on the land which gives the support, the other land is injured by the withdrawal of the support. In the former case, if one excavation causes several successive subsidences, each subsidence is a fresh cause of action, and time begins to run from the instant when the subsidence takes place, while in the latter case the interference with the easement is the cause of action, and time begins to run from the interference.

The author discusses, at considerable length, the various modes of acquiring a right to artificial support, viz. grant, covenant, prescription and Act of Parliament.

At page 12 he discusses very concisely the question how far the surface owner may have the right to support of subterranean water, a question which is gradually acquiring importance.

We must enter a protest against the author's manner of citing cases. He often gives references to the Law Journal only, and that even in instances where the reference to the so-called authorised report[1] could be found without much labour. For example, the only reports of the important case of *Bonomi* v. *Backhouse* in the Courts of Queen's Bench and Exchequer Chamber that he refers to are in the Law Journal, while the reference to El. Bl. and El. is given in the report in H. L. C. which he cites. Again,

[1] The term 'authorised' as applied to reports before the commencement of the Law Reports appears to be correct. One of the Vice-Chancellors at least was in the habit of positively declining to listen to any case as reported in an unauthorised report. In some, if not all, of the Courts the authorised reporter alone had any facilities given to him by the Bench. When the New Reports were started in 1862 application was made to a learned Judge for liberty for the reporter to see his written judgment: it was refused on the ground of the vested right of the authorised reporter, and that notwithstanding that (as the Judge said in his letter of refusal) some of the reporters for the New Reports were his personal friends.

where he cites *Hunt* v. *Peake* he only refers to the Law Journal in the text, while in the index of cases he refers also to the report in Johnson.

The Law and Practice of Letters Patent for Inventions. By Lewis Edmunds, assisted by A. Wood Renton. London: Stevens & Sons, Limited. 1890. Royal 8vo. lii and 940 pp.

Notwithstanding the considerable number of good and useful books upon Patent Law—Mr. Lawson's treatise on the Acts and Rules, and Mr. Johnson's manual, of which we acknowledge a new edition elsewhere, may be cited as particularly valuable—there has not, since the publication of Hindmarch's book in 1846, been produced a comprehensive book dealing with the history and development of the law as well as the organization of the Patent Office, and the practice within and outside the office. Mr. Hindmarch's book gives a complete account of the law and procedure of his time. The main features of the law have since then been little altered, but the reforms in procedure, and still more in organization, have been great. Before 1852 the offices appear to have been arranged as if to extract the maximum amount of fees for the minimum of service. The Act of 1852 inaugurated an astonishing reform in this respect. And the Acts 1883–1888 have so increased the popularity of the business, that for a yearly average of 450 grants before 1852, there are now about 10,000. The history of all this is set forth with sufficient, and not too much, detail in the present work; full use being made of the information contained in the Reports of Parliamentary Committees and Commissions at the various stages of contemplated reforms.

The chapter upon the Patent Office, divided into sections describing the offices before 1852, the Great Seal Patent Office 1852–1883, and the Patent Office under the Act of 1883, is especially good for its condensed information.

After the early chapters, combining an historical statement of the law of monopolies with the principles of the law as settled in accordance with the Statute of James I, law and procedure are treated together in an order corresponding to the successive stages of the application, grant, and subsequent proceedings. All this forms the first part of the work, occupying 416 pages, and ending with a short but useful chapter on international and colonial arrangements.

The second part consists of the Acts 1883–1888, consolidated and annotated, and the Patent Rules 1890, &c. The third part is in the form of an Appendix consisting of the entire series of statutes, the official forms, and an epitome of foreign and colonial laws.

The whole forms a comprehensive and trustworthy guide to the law and Practice of Patents brought up to the present time.

The Practice on the Crown Side of the Queen's Bench Division of Her Majesty's High Court of Justice. (Founded on Corner's 'Crown Office Practice.') By Frederick Hugh Short and Francis Hamilton Mellor. London: Stevens & Haynes. 1890. 8vo. lxviii and 835 pp.

Four or five years ago it was extremely difficult to find out anything about the practice of the Crown Office in such matters as Mandamus, Certiorari, Habeas Corpus, and Prohibition, by any means except personal inquiry at the Office. It was currently asserted that only one copy of 'Corner' existed, and that one consisted largely of manuscript annotations

made in it by loving hands. It was therefore a thing to be treated reverently, and could be consulted nowhere except in the Crown Office itself. All that is now changed. The present Rules—the first ever promulgated by the Crown Side of the Queen's Bench Division—were published in 1886, and admirably edited by Mr. Short. Since then there has been published a useful work on the Prerogative Writs by Mr. Shortt—quite a different person it will be observed—and now Mr. Short and Mr. Francis Mellor have produced a volume of practice on the Crown Side, embracing all that is necessary to be known by any one having a case in the Crown Paper. They have included besides the practice as to Prerogative Writs, and other matters pertaining exclusively to the Crown Office, the practice as to Special Cases from Quarter Sessions, as to Appeals from County Courts and other inferior Courts, and as to Inquisitions of Escheat, which have now to be filed in the Crown Office, in accordance with the Escheat Act, 1887. No one who has had occasion to use Mr. Short's edition of the Crown Office Rules, will be surprised to hear that the work in which he has collaborated with Mr. F. H. Mellor is remarkably lucid, accurate, exhaustive, and well-arranged. It supplies handsomely a want which the authors (with complete truth, if not in an unprecedented form of expression) declare to have been felt for a long time. It thoroughly illuminates a region of mystery, which was mysterious only because there was no book on the subject, and it makes the Crown Practice as easy to master as any other. The volume contains the Crown Office Rules, 1886, the appropriate parts of the Rules of the Supreme Court, 1883, and a large collection of authoritative forms. The index, as far as a partly practical and partly experimental test can show, is an exceedingly good one.

Roscoe's Digest of the Law of Evidence in Criminal Cases. Eleventh Edition. By Horace Smith and Gilbert George Kennedy. London: Stevens & Sons, Limited; Sweet & Maxwell, Limited. 1890. 8vo. lxiv and 1060 pp.

Roscoe's 'Criminal Evidence' is not a digest, and what it has to say about the law of evidence properly so called, is the shorter and less important part of the book. Nevertheless it is a useful book, though less popular than Archbold (and in our opinion deservedly so) as a general work of reference in criminal practice. The eleventh edition, which is now published by Mr. Horace Smith and Mr. G. G. Kennedy, both police magistrates in London, is the first in which the Criminal Law Amendment Act, 1885, is incorporated, the Act for the Prevention of Cruelty to Children being also of course included for the first time. The effect of the latter, a statute not making much change in the law, and upon which there have not yet been any reported decisions, and are not likely ever to be many, is briefly and clearly set out in a short chapter. The recent decisions of the Court for Crown Cases Reserved appear to have been accurately and sufficiently embodied in the work.

We have also received:—

The Judicial Dictionary, or words and phrases judicially interpreted. By F. Stroud. London: Sweet & Maxwell, Limited. 1890. Large 8vo. cxvi and 916 pp.—The object of this book may be concisely stated in the words of the preface: 'This work in no sense competes with, nor does it cover the same ground as, the law-lexicons of Jacob, Tomlins, Wharton, or

Sweet. As its name imports, it is a dictionary of the English language (in its phrases as well as single words) so far as that language has received interpretation by the Judges. Its chief aim is that it may be a practical companion to the English-speaking lawyer, not only in the mother-country but also in the Colonies and dependencies of the Queen. The hope is also indulged in that it may be not without utility to the man of business, nor without interest to the student of word-lore.'

This book very fairly carries out the intentions of the author. It possesses considerable merit, though, as one would naturally expect, the articles are of unequal value. It bears marks of considerable research, and the old as well as the modern authorities have been consulted. In the addenda the most recent cases are noted up.

Generally speaking the author does not discuss disputed meanings; sometimes he refers the reader to the cases where the arguments will be found, at other times he refers to a well-known text-book in which the disputed meaning is discussed. Probably this was the only course that it was possible for the author to pursue, as if he had in all cases given the arguments he would have added enormously to the bulk of his book.

It is not possible to give a decided opinion as to the merits of a book of this nature until one has had it in use for a long time. This we have not been able to do, but during the time that it has been in our chambers we have had it in constant use and have found it very useful.

Outline of Roman History from Romulus to Justinian (including translations of the Twelve Tables, the Institutes of Gaius, and the Institutes of Justinian), &c. By DAVID NASMITH, Q.C. London: Butterworths. 1890. 8vo. xix and 618 pp.—Mr. Nasmith, in his preface, quotes 'the author of the Institutes of Justinian' as saying that 'Jurisprudence is the knowledge of things human and divine, and the exact discernment of what is just and unjust,' and 'the law of nature is not a law to man only,' &c. Mr. Nasmith then adds, 'It is inconceivable that such and many other like passages findable in Justinian could have emanated from a jurist.' Unfortunately they both did 'emanate' from Ulpian, as is well known to every one who has consulted the first title of the Digest. Need we remind the reader that Ulpian was simply copying Stoic phrases to show that a Roman lawyer could philosophize? Cf. L. Q. R. iii. 67. Mr. Nasmith also complains that 'speaking generally, the writers of [books on Roman History] practically ignore the existence of Roman Law, and the authors of [books on Roman Law] that of Roman History.' It would seem therefore that Mommsen knows no law and Ihering knows no history. We fear they will not consent to learn from Mr. Nasmith. Not many kinds of blunders in the preface to a book will justify the reviewer in declining to read any of the text, but some will. In a book on Roman legal history these may be thought justification enough. The feat of writing a book of more than 600 pages on that subject without ever looking at the first title of the Digest is a remarkable one, but we would rather have seen it performed by some one else than one of Her Majesty's counsel.

The Sale of Goods, including The Factors' Act, 1889. By His Honour JUDGE CHALMERS. London: W. Clowes & Sons, Limited. 1890. 8vo. xxix and 170 pp.—This little book, which we hope to notice more fully in October, contains the results of more labour in production and requires more labour in effective criticism than many far more pretentious and bulky volumes. It is, in the first place, an annotated recasting of the Sale of Goods Bill, drafted by Judge Chalmers and introduced into the House of Lords by

Lord Herschell in the sessions of 1888 and 1889. This bill was a purely codifying measure, endeavouring to formulate in an Act that part of the law which deals with the Contract of Sale. Judge Chalmers has added notes, illustrations, references to authorities, and comparisons of English with Scotch and Civil Law. The work will be most useful both to scientific students of the law and to commercial lawyers.

A Digest of the Criminal Law of Canada (*Crimes and Punishments*). *Founded by permission on Sir James Fitzjames Stephen's Digest of the Criminal Law.* By GEORGE WHEELOCK BURBIDGE, Judge of the Exchequer Court of Canada. Toronto: Carswell & Co. 1890. La. 8vo. lxiii and 588 pp.—A few pages of general introduction would have added to the interest and utility of this work for non-Canadian readers, as, for example, the learned Frenchman who will doubtless make a report on it in due course to the *Société de législation comparée*. To some extent the matter is supplied by Article 2 of the Digest, 'Application of the Law of England,' which shows how English criminal law was received at very different dates in the different Provinces, and, therefore, save so far as revised and supplemented by Canadian legislation, is not uniformly applicable throughout the Dominion. It does not appear, however, that this causes any material difficulty in the common course of administering criminal justice in Canada.

Histoire des sources du droit français. Origines romaines. Par ADOLPHE TARDIF. Paris: Alphonse Picard. 1890. La. 8vo. v and 527 pp.—There was a time when English students had to be exhorted not to overlook the historical school of Germany. Perhaps the time has now come round to remind them that the German school is not the only one. The best traditions of French learning have shown a remarkable increase of vitality in all directions since France was delivered from the Second Empire, and not least in the history of legal and political institutions. We can now say no more of the present work than that M. Tardif is an acknowledged master of his subject. The book is specially designed for use in the Ecole des Chartes.

The Student's Blackstone: being the Commentaries on the Laws of England of Sir William Blackstone, Knt., abridged and adapted to the present state of the law. The eleventh edition. By R. M. N. KERR. London: Reeves & Turner. 1890. 8vo. xx and 618 pp.—If books of this kind ever lead any student to read the real Blackstone, their existence is justified. One inconvenience of their form is that the editorial matter itself may easily escape being 'adapted to the present state of the law,' as where we read in this edition that 'it would be premature to express any opinion on the recent consolidation' (1875, fifteen years ago) 'of the Superior Courts of Law and Equity into one High Court of Justice.'

The Contract of Affreightment as expressed in Charter-parties and Bills of Lading. By T. E. SCRUTTON. Second edition. London: W. Clowes & Sons, Limited. 1890. 8vo. xlvi and 343 pp.—The digest form, introduced into English legal literature by Mr. Justice Stephen from the Anglo-Indian codes, appears to be steadily gaining in favour. Mr. Scrutton is not the least among its recent adherents. Of course much depends on the digester: he must first labour to be accurate, and then conceal his labour in order to be lucid. Mr. Scrutton spares neither thought nor labour, and he is rewarded by the approval of the profession in its most practical form.

A Treatise on the Law and Practice of Patents for Inventions, &c. By James Johnson and J. Henry Johnson. Sixth edition, revised and enlarged. London: Longmans, Green & Co. 1890. 8vo. xxxii and 534 pp.—This edition appears to be the first which has embodied the Act of 1883 and the later supplementary statutes. In this and other respects it may be considered as practically a new book.

Prospectus-makers and the Public. London: Sir Joseph Causton & Sons. 1890. 8vo. v and 147 pp.—Sir Henry Peek has put together a full account of the litigation in *Peek* v. *Derry*, with an introduction partly narrative and partly argumentative. Sir Frederick Pollock's article from the Law Quarterly Review is reprinted, as well as the judgments in the case, the Bill now before Parliament with regard to statements contained in prospectuses, and another draft suggested by Sir H. Peek himself.

The Annual County Courts Practice, 1890. Founded on Pollock and Nicols' and Heywood's Practices of the County Courts. By George Washington Heywood. Two vols. London: Sweet & Maxwell, Limited. 1890. 8vo. xxxiv and 935, xii and 351 pp.—This is a fusion of the two earlier works mentioned on the title-page, in which 'the best parts of both books have been retained; but the text has been entirely revised, much of it rewritten and the whole rearranged.' The so-called 'Rules of Evidence' in chap. 2 include an epitome of substantive law ('Nisi Prius'-wise) which we should have thought too short to be of much use.

Reports of Cases under the Companies' Acts, decided in the High Court of Justice, the Court of Appeal, and the House of Lords. Reported by W. B. Megone. Vol. I, with complete Digest and Index. London: Sweet & Maxwell, Limited. 1890. La. 8vo. x and 493 pp.—So far as we have made the comparison, we find that Mr. Megone gives a better report of arguments than the Law Reports, and decidedly better head-notes.

Tableau des origines et de l'évolution de la famille et de la propriété. Par Maxime Kovalevsky. Stockholm. [1890.] 8vo. 202 pp.—The Russian authorities know best why such an acknowledged master as Mr. Kovalevsky lectures at Stockholm and Oxford. For us it is so much the better; for Moscow and Russia, one would think, so much the worse.

Allgemeine Staatslehre als Einleitung in das Studium der Rechtswissenschaft. Von Hermann Henschel. Erste Lieferung. Berlin. 1890. 4to. 96 pp.—After a certain age one comes to think that one learned German's *Staatslehre* is very like another. Let us hope that Herr Henschel's (we have not yet had time to read it) may be a brilliant exception.

The Judicature Act of Ontario, and the Consolidated Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario, with practical notes. By George S. Holmested and Thomas Langton, Q.C. Toronto: Carswell & Co. 1890. 8vo. cxxiv and 1330 pp.

The Study of History in Germany and France [John Hopkins University Studies]. By Paul Frédéricq. Translated by Henrietta Leonard. Baltimore. 1890. 8vo. 118 pp.

Commentaries on the Present Laws of England. By Thomas Brett. Two vols. W. Clowes & Sons, Limited. 1890. 8vo. cvi, xxiii and 1233 pp.

Examination of some Statements in the pamphlet of Mr. J. Fletcher Moulton, Q.C., *on 'The Taxation of Ground Values,' and in the Evidence*

of Mr. Sidney Webb *before the Town Holdings' Committee.* By G. M. Clements. 8 pp.

Rogers on Elections. Part I. Registration, Parliamentary, Municipal and Local Government, including the Practice in Registration Appeals, &c. Fifteenth Edition. By M. Powell. London: Stevens & Sons, Lim. 1890. 8vo. xxxv and 759 pp.

The Factors' Act, 1889, *with Commentary and Notes, designed particularly for the use and guidance of mercantile men.* By Charles H. L. Neish and A. T. Carter. London: Stevens & Sons, Lim. 1890. 8vo. xii and 59 pp.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

REFERRING to the article in the April number of the REVIEW on the *Rio Tinto* case as decided in Paris last December, it may be of interest to note that about the same time a case was decided in the Court of Session in Scotland, which is looked upon by some as tending to the opposite extreme. In *Bidoulac* v. *McKidd* (17 R. 144), *A* in 1880, by a lease for nineteen years, let to *B* a farm at the annual rent of £205, there being a provision in the lease to the effect that 'in the event of *B*'s bankruptcy the lease shall *ipso facto* become void and null, as if the same had never been entered into and all right title or management of or in the lands competent to *B* or to any trustee or manager for his creditors shall cease and determine, and the same is hereby declared to be forfeited to *A* accordingly.' In 1886, *B*'s estates were sequestrated, and his trustee at once wrote to *A*, quoting the above clause of the lease, and intimating that in terms thereof, he, as trustee, would vacate the farm at the next term. Of this intimation *A* took no notice, but let the farm to *C* at a reduced rent, and after the latter's entry claimed to rank on *B*'s estate for the amount of the reduction of rent capitalized for thirteen years (the years to run of *B*'s lease), under deduction of discount at 4 per cent. *B*'s trustee rejected the claim on the ground that it was barred by the lease, and relied on the *ipso facto* clause of forfeiture. On appeal, the Lord Ordinary sustained this deliverance, but the First Division of the Court unanimously recalled it, and directed the trustee to rank *A* for the full amount claimed. The Court held that the clause in the lease was one for the benefit of *A*, and to be exercised in his option, and the trustee having intimated his determination to vacate the farm, thereby abandoned the lease, and rendered *B*'s estate liable to *A* in damages for breach of contract.

R. M. W.

A recent judgment of the Roman Court of Cassation illustrates the limits set by Italian law to the principle that the legality of a contract is to be decided by the *lex loci contractus*. In the case before that Court, the plaintiff, a British subject, sued an Italian domiciled in Constantinople, in the local Consular Court, in respect of certain transactions on the London Stock Exchange which, though sanctioned by English law, are treated by Italian jurisprudence as gaming or wagering contracts, unless such transactions are carried out—which those in question were not—in conformity with the provisions (chiefly of a fiscal nature) contained in the Italian Stock Exchange Act of 1876. From the Consular Court, which gave judgment for the plaintiff, the case was taken to the Court of Appeal at Ancona, which affirmed the judgment. But the Roman Court of Cassation, which finally disposed of the case, reversed the judgment, on the ground

that art. 1802 of the Italian Civil Code, which enacts that 'the law accords no right of action for a gaming or wagering debt,' thereby *prohibits* contracts of that nature; and that as art. 12 of the 'Dispositions for the Promulgation, Construction, and Application of the Laws in general' enacts that 'the laws of a foreign country can in no case derogate from the *prohibitory* laws of the realm,' the Italian Courts could not, in the case under consideration, give effect to the *lex loci contractus*.

T. B. B.

We observe with mixed amusement and regret that some learned persons in America still regard that strange apocryphal work the Mirror of Justices as an historical authority. The Hon. C. Caldwell, speaking at the 'dedication' of a court-house in Arkansas last year, gravely quoted the fable of King Alfred hanging forty-four judges for false judgments. In at least one of these cases the modern lawyer can have but little sympathy with the fourteenth-century publicist who adopted this archaic method of illustrating his opinions by imaginary examples. The crime attributed to the judge is simply that he invented (in anticipation of modern statutes) the offence of larceny by a bailee.

Those of our readers who are interested in Fustel de Coulanges' work may be glad to have their attention called to M. Rodolphe Dareste's criticism of 'L'alleu et le domaine rural' in the February number of the *Journal des Savants*. M. Dareste, who may be described as a moderate and candid follower of the Germanic school, corrects or qualifies several of the lamented author's conclusions of detail. M. Glasson has issued a separate reply to the somewhat personal strictures on his work contained in the same volume.

The decision of the Court of Appeal on the rule against perpetuities in *Whitby* v. *Mitchell*, 44 Ch. Div. 85, will be fully discussed in the leading articles of our October number.

The reckless drafting of Acts of Parliament, contrasted with the patient and careful analysis bestowed on their interpretation by the Judges, is a sight which might well make the angels weep. In *Duncan* v. *Dixon* (44 Ch. D. 211) it was again the Infants' Relief Act, the particular point being whether the Act made void a marriage settlement by an infant. If it does, the prospect is a serious one, for out of the large number of marriage settlements by infants, a very small proportion is made under the Infants' Settlements Act. Conveyancers are accustomed to rely on the infant ratifying the settlement on coming of age, it being in most cases greatly to the infant's advantage to do so. Where the settlement operates by way of grant they may safely rely on ratification. It is satisfactory to know that the Infants' Relief Act does not prevent ratification even where the settlement operates by way of contract or covenant. Putting aside *Coxhead* v. *Mullis* (3 C. P. D. 439) and cases of that class, Kekewich J. thinks the Act 'reasonably free from difficulty'; otherwise, an inscrutable mystery. So the learned Judge, in medical language, 'isolates' these cases. If *Coxhead* v. *Mullis* was a false step at starting, it is due to the Judges who decided it to observe that it was only so in the sense that we may shrewdly conjecture the Legislature did not mean what it said.

Infants are the spoilt children of English law. Readers of *Mayor* v. *Collins*, 24 Q. B. D. 361, will be startled to find that an infant, whether plaintiff or defendant, cannot be compelled to answer interrogatories. We do not dispute the legal soundness of the decision; we greatly doubt its conformity to good sense.

There have been several decisions by Judges of first instance that a banker's deposit note is a good subject of a *donatio mortis causa* (*Amies* v. *Witt*, 33 Beav. 619; *Re Taylor*, 56 L. J. Ch. 597; *Re Farman*, 57 L. J. Ch. 637). The peculiarity of the deposit note in *Re Dillon* (44 Ch. Div. 76) was (1) its being marked 'Not transferable,' and (2) having a cheque to bearer indorsed on the back to be signed by the depositor on payment, which the donor had not signed. Both these difficulties the Court treated as mere straws—being of opinion that the object of requiring the indorsed cheque to be signed by the depositor was merely that the banker might retain it as a receipt, and that as to transferability the Court would aid the donee by requiring the executor to transfer. Lord Eldon long ago stated in *Duffield* v. *Elwes* (1 Bl. N. R. 497) that the rule that the Court will not aid a volunteer does not apply to a *donatio mortis causa*. The Court of Appeal in *Re Dillon* speak of this as anomalous, but it seems doubtful whether there is any anomaly. A *donatio mortis causa*, unlike a *donatio inter vivos*, becomes absolute only in the event of the donor's death. It resembles a legacy more than a gift. It is liable to debts and legacy duty, but subject to these the executor has no more right to dispute the donee's title than the title of any specific legatee.

The other branch of the Court of Appeal discussed a long doubted point as to gifts *inter vivos* in *Cochrane* v. *Moore*, at present to be found only in 6 Times Rep. 296; a case to which we shall return in a future number. We note meanwhile that the Court neither decided nor said that a gift of chattels by word of mouth without delivery has not any effect at all.

The right of an executor to prefer one creditor of equal degree to another 'breaks in,' as Sir J. Leach said in *Maltby* v. *Russell* (2 Sim. & St. 228), 'upon the ruling principle that equality is equity'; but it is one of the well-established anomalies of our law (*Re Radcliffe*, 7 Ch. D. 733): only it must be exercised, if at all, before judgment for administration which impresses the assets with a trust for *all* the creditors. An order for an account under O. 15 in an administration action is not, it seems, equivalent for this purpose to a judgment and does not take away the right (*Re Barrett*, 43 Ch. D. 70), neither will the circumstance that one creditor has commenced an action against the executor to recover his debt prevent the executor preferring another (*Vibart* v. *Coles*, 24 Q. B. Div. 364), though it would formerly at law. (See *Tolputt* v. *Wells*, 1 M. & S. 395.) There is a fine irony in saying that the equity rule now prevails. The unlucky creditor cannot even get a receiver, for the executor is only acting within his legal rights (*Re Harris*, 35 W. R. 710; *Phillips* v. *Jones*, 28 Sol. J. 360). An executor's right of retainer is an analogous anomaly, but more justifiable seeing the executor cannot sue himself. As Lindley L.J. says, it has been 'so ill thought of by Chancellors and those who have had the development of chancery jurisdiction, that they have declined to follow the law where they have had equitable assets to deal with.' In *Re Baker* (38 W. R. 417) creditors of an insolvent estate tried to get the adminis-

tration transferred to bankruptcy in the hope of defeating the right, but the Court of Appeal gave no countenance to the idea that a mere change of forum could affect it. Retainer is the only compensation left to a burdensome and thankless office.

A fiction of law is a convenient 'deus ex machina' where legal obligations fall short of moral. Thus given, a lunatic, who has been supplied with necessaries, elementary justice requires that the lender should have some means of getting repaid. What, then, so easy as to say that the lunatic has entered into an implied contract? A fiction of law, however, like a fairy tale, must have an air of credibility, not to say a substratum of truth, and talking about an implied contract by a lunatic has an unwholesome element of unreality. 'Furiosus stipulari non potest' (Bracton). It was quite time for the Court of Appeal to explain (*Re Rhodes*, 44 Ch. Div. 94) that 'this most unfortunate expression' of an implied contract which runs through the cases, means only that there is an obligation analogous to contract creating a debt from the lunatic's estate. Here we are on *terra firma*. The obligation having been built up we may now take down the scaffolding of implied contract. The new Lunacy Act, 1890, says nothing of contracts by lunatics, but it gives a union power to recover expenses of a lunatic's maintenance against his estate (s. 299). One of the most useful parts of the Act is that which gives the Judge in lunacy (s. 116 *et seq.*) the same powers of management and administration in case of persons of unsound mind as in case of lunatics so found. Hitherto the unsound have been at an undue disadvantage, inquisition being the only evidence on which the Crown exercises its protecting care and custody.

A rule of construction which generally defeats the testator's intention must be somehow defective. If, for instance, an ordinary person were asked whether a testator meant to exclude the children of a brother or sister from taking their parent's share according to the accident of a brother or sister dying before or after the date of the will, the unsophisticated mind would certainly say No. Sir George Jessel, who possessed in an eminent degree the 'genius of common sense,' being pressed in *Re Smith's Trusts* (5 Ch. D. 497 n.) with *Christopherson* v. *Naylor* (1 Mer. 320), declined to attribute such a 'capricious intention' to the testatrix in that case. Vice-Chancellor Malins calls it (*Christopherson* v. *Naylor*) 'the origin of a most unfortunate construction' (*Re Potter's Trusts*, 8 Eq. 57), and Stirling J. in *Re Chinery* (39 Ch. D. 614, 621) said he should have had a 'strong inclination' to follow the opinion of Sir G. Jessel if he could. However, the Court of Appeal has now set the seal of its authority on *Christopherson* v. *Naylor* (*Re Musther*, 43 Ch. Div. 569). The distinction taken or rather recognised is a highly artificial one, viz. that what is given is the share of the dead brother or sister, nephew or niece, as the case may be, not the share which such dead brother or sister would, if living, have taken, but as Sir G. Jessel says, when the share of a dead brother or sister is given to his or her children, what can such share mean but the share which the dead person, if living, would have taken? The vicissitudes of *Christopherson* v. *Naylor* are only one more illustration of the uncertainty that attends all will construction. The oscillation of judicial opinion which it represents is the necessary result of the conflict of common sense and technical rules. It suggests the question whether technical rules should ever be applied to the construction of inarti-

ficial wills. Lord Esher thinks not (*Att.-Gen.* v. *Greene*, unreported) and Sir G. Jessel, he says, shared that opinion.

Useful to Householders. 'Good tenantable repair is such repair as taking into account the age, the character, and the locality of the house, would make it reasonably fit for the occupation of a reasonable-minded tenant of the class who would be likely to want the house.' This definition by Lord Esher and Lopes L.J. (*Proudfoot* v. *Hart*, 6 Times R. 305) sums up the case, but perhaps is a little 'at large,' as indeed Lord Esher confesses, for the purposes of the ordinary tenant. Put practically, it means that an outgoing tenant may patch up as long as reasonable, and need not renew. He is under no obligation to repaint or repaper where such painting or papering is merely decorative. As to what is 'decorative repair' we have only Lord Esher's dictum that Appeal Court No. 1 is not in a state of decorative repair; but judging by *Crawford* v. *Newton* (35 W. R. 54), decorative repair is distinguished from substantial or structural repair, i.e. repair necessary to maintain the fabric unimpaired. Sometimes neglect to paint will cause the woodwork to rot, then the tenant must paint or whitewash. The principle is, he must not commit waste voluntary or permissive.

The plaintiff in *Bank of New South Wales* v. *O'Connor* (38 W. R. 467) tumbled into a very natural pitfall. He made the mistake of supposing that tender by a mortgagor to the morgagee of principal, interest, and costs, is equivalent to actual payment entitling him on the mortgagee's refusal to recover the mortgage deeds by action. Refusal by a mortgagee to accept a proper tender is, as Lord Macnaghten pointed out, not a breach of the mortgage contract for which an action will lie. The case of a pledgee is different, for he has only a special property. A mortgagee cannot be compelled to part with his security till he has received his money (*Postlethwaite* v. *Blythe*, 2 Sw. 256). If tender is refused, the mortgagor should, according to the modern practice, get leave to pay into Court a stated sum sufficient to cover principal, interest, and probable costs of suit, and on such payment he may recover his deeds. A mortgagee refusing a proper tender runs the risk of being deprived of his costs.

The old Court of Chancery was very strict with a mortgagee: like Shylock, he was to have his bond and nothing more. He could not clog the equity of redemption by any bye agreement or charge for his personal trouble more than a trustee; but this grandmotherly protection of mortgagors has yielded to a fuller recognition of the just rights of mortgagees as creditors (*Nainland* v. *Upjohn*, 41 Ch. D. 126; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53). In disallowing a solicitor-mortgagee profit costs of realising his security, the Court of Appeal is retracing the 'ancient ways' (*Re Wallis, Ex parte Lickorish*, 38 W. R. 483). The absurdity of the thing is that the solicitor-mortgagee may employ another solicitor, though he may not employ himself, to prepare or realise his security. In *London Scottish Benefit Society* v. *Chorley* (13 Q. B. Div. 875), Brett L.J. remarked that it would be unadvisable to lay down that a solicitor-defendant shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor. We may safely predict, without the sanction of a Lord Justice's experience, that the solicitor-mortgagee will in future always employ another solicitor. The only result of 'protecting' the mortgagor will be to saddle him with a heavier bill of costs.

'It is no doubt a startling thing,' as Lindley L.J. said (*Clegg* v. *Hands*, 38 W. R. 436), 'to be told that when you have agreed to buy beer of a particular brewer you may find yourself bound to take bad beer of somebody else;' but such surprises are incident to improvident contracts. The tenant of the tied house in that case fought hard not to be handed over to another brewer, but in vain. He had 'tied' himself too effectually not only to his lessors, but to their assigns and successors. Moreover, and this is the point of the case, such a covenant runs with the land. It 'touches and concerns the thing demised,' to use the language of Spencer's Case. In principle it is the same as the covenant in *Vyvyan* v. *Arthur* (1 Bl. C. 415) to grind at the lessor's mill. Furthermore, such a covenant to take beer exclusively from one brewer, though in form an affirmative, is in substance a restrictive covenant, and as such enforceable by injunction at the suit of the lessor (*Tulk* v. *Moxhay*, 2 Ph. 774). All these things were against the recalcitrant tenant, but they are 'good hearing' to the brewer. When the value of a brewery depends, as it does in these days, chiefly on the number of its tied houses, it is highly important to the brewer to have a tight hand over his tenants.

If *Re Bryant & Barningham's Contract* (38 W. R. 469) had been merely an attempt by the vendor in Vice-Chancellor Shadwell's phrase, 'to bolster up his title at the last moment,' he might have succeeded, but it was more. The vendor, finding he had no title at all (the trust for sale under which he purported to sell not having arisen), got the tenant for life to agree before the day fixed for completion to make a title under the Settled Land Act. The purchaser, captiously or not, objected to have a new vendor put upon him, and the Court of Appeal held his objection good. Where covenants for title are involved, there may be a great difference between one vendor and another.

In *Jones* v. *Watts* (43 Ch. Div. 574) a purchaser made a bold attempt to circumvent the Vendor & Purchaser Act. That Act, or the Conveyancing Acts, would not be of much use in shortening titles, if a lessee, though not entitled to call for his lessor's title to the freehold, could claim discovery of the lessor's title-deeds to the freehold by a bare denial of his title. What the lessee may do however is to prove *aliunde* that the title is bad, e.g. by reason of restrictive covenants undisclosed, and he has then the right of an ordinary litigant to discovery: but he must raise a clear issue. On the subject of discovery, *Wiedemann* v. *Walpole* (24 Q. B. D. 537) is noticeable. Hitherto an affidavit of documents has been conclusive, subject to certain well-recognised qualifications (*Jones* v. *Monte Video Gas Co.*, 5 Q. B. Div. 556). It cannot even be cross-examined to indirectly by interrogatories (*Morris* v. *Edwards*, 23 Q. B. Div. 287). If *Wiedemann* v. *Walpole* is correct, this rule does not apply to inspection under O. 31, R. 18, so that the Court may order inspection to be given, where it could not order production against the oath of the party. This goes far to undermine the old rule. If inspection could be given, it must be admitted that the facts in *Wiedemann* v. *Walpole* showed a strong case for giving it.

That anomalous being, the married woman, is slowly establishing her legal status as a feme sole. The Probate Rules of 1887 provide for grant of probate to a married woman like anybody else, and *Smart* v. *Tranter* (43 Ch. Div. 587) illustrates the convenience of the practice. In that case a wife's

will comprised some choses in action which were not her separate property, but which she had given away from her husband. Under the old practice in such a case, the husband would have had to obtain a caeterorum grant. Kay J. indeed thought that he must still apply for a revocation of probate, but the Court of Appeal solved the difficulty without any such deplorable circuity of proceedings. The general grant of probate means what it says, that the married woman's executor takes her whole personal estate. If part of it is non-separate property she cannot dispose of it, and therefore the executor is a trustee of such part for the husband. It is the same if part of the separate property is undisposed of (*Re Lambert's Estate*, 39 Ch. D. 626), but the husband can only take subject to the payment of probate and testamentary expenses incurred by the executor as he would if taking out administration.

Bonner v. *Lyon* (38 W. R. 541) comes opportunely as an antidote to *Leak* v. *Driffield* (24 Q. B. D. 98). In *Leak* v. *Driffield* the married woman, who had contracted the debt, had separate property in the shape of her own and her children's clothes; in *Bonner* v. *Lyon* she had separate property in the shape of furs and jewellery, to the value of over £200. It would have been scandalous if in the latter case she could have escaped. The important point of the decision is that the married woman's liability on her contracts does not depend on her intending or not to bind her separate property. She must be deemed to have bound her separate property, says the Act, 'unless the contrary be shewn' s. 1. (3). These words, observed Vaughan Williams J., do not let in evidence of her intention, but only whether or not she has separate property capable of being bound. As to what separate property will give capacity to contract, no rule of 'nicely calculated less or more' such as that in *Leak* v. *Driffield* can possibly be satisfactory.

Spelling out a contract from letters requires great care. People, as a rule, in writing letters do not write with the precision or circumspection of a lawyer drawing a formal deed. Lord Cairns was therefore well founded in saying (*Hussey* v. *Horne-Payne*, 4 App. Cas. 316) that where you have to find your contract or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed: 'You must go into all that passed, not only in letters, but in conversation' (*Wylson* v. *Dunn*, 34 Ch. D. 576). *Hussey* v. *Horne-Payne* was itself a very good example, for there was a parole bye agreement for payment of the purchase money by instalments which did not appear at all on the face of the letters. But it is an equally important principle that when people have once struck a bargain by letter or otherwise, one of the parties should not be allowed to add a new term and say when it is objected to that the whole was mere negotiation. Thus *A* offers *B* his business, lease, and goodwill for £450. *B* says, 'I accept.' A day or two afterwards, *B* asks *A* to engage not to carry on a similar business within a distance of five miles. *A* answers, 'I cannot agree to that, but I will if you say three miles.' Is *A* or *B* entitled to put an end to the contract because the subsequent negotiation as to *A*'s engaging in trade goes off? Kay J. seems to have thought so (*Bristol Bread Co.* v. *Maggs*, 38 W. R. 393) on the authority of *Hussey* v. *Horne-Payne*, but *Bonnewell* v. *Jenkins* (8 Ch. Div. 70) seems more in point than *Hussey* v. *Horne-Payne*. In *Oliver* v. *Hunting* (44 Ch. D. 205) Kekewich J. had to decide whether parole evidence was admissible to connect two documents so as to constitute a note or memo-

randum within s. 4 of the Statute of Frauds. If one document refers expressly to the other, it incorporates it and there is no difficulty, but in *Oliver* v. *Hunting*, the reference was by implication only to some previous transaction 'on account of purchase money' in a receipt signed by the purchaser. Such an ambiguity like the word 'balance' in *Studds* v. *Watson* (28 Ch. D. 305) puts the Court on inquiry, and for that purpose lets in parole evidence. There is nothing in this to defeat the policy of the Statute, for the terms when found are in writing. Any other rule would work the greatest injustice.

The Court of Appeal came very near, when deciding *In re Artola Hermanos*, 24 Q. B. Div. 640, to the determination of one of the most curious questions of so-called private international law, namely whether the Court of the bankrupt's domicil is the proper *forum concursus*, with the consequence that when once a debtor has been made bankrupt there a subsequent bankruptcy in England ought to be stayed.

Unfortunately in the particular case the counsel for the French Syndic could show that the debtor in question had been made bankrupt in France before bankruptcy proceedings were taken in England, but could not show that he had a French domicil. The judgment of the Court of Appeal therefore, which upholds the English bankruptcy, throws no direct light on the problem of what according to the view of English tribunals is the effect of a bankruptcy pronounced in the country where a debtor is domiciled.

Japan is fast taking her place among civilized nations. Within a few months she will enjoy a Constitution intended to embody all the newest devices of European Parliamentary government. To persons intending to visit Japan it is of even more consequence that a marriage between a British subject domiciled in the United Kingdom and a Japanese is, if celebrated in accordance with the local form, valid. *Brinkley* v. *Attorney-General*, 15 P. D. 76.

A doctrine has found its way into all the text-books on the law of contract that 'if money is paid, or goods delivered, for an illegal purpose, the person who has so paid the money, or delivered the goods, may recover them back before the illegal purpose is carried out.' This dogma, for which the best authority is *Taylor* v. *Bowers*, 1 Q. B. Div. 291, 300, has long puzzled teachers and students of law. *Kearley* v. *Thomson*, 24 Q. B. Div. 742, shakes the doctrine to its base. For the judgment of the Court of Appeal decides directly that where the illegal contract has been partially performed, the money or other consideration cannot be recovered back, and indirectly suggests that the whole doctrine as to recovery laid down in *Taylor* v. *Bowers* may be unsound. At all events the concluding part of the statement of Mellish L.J. in that case must be amended so as to read: 'before *any material part of* the illegal purpose is carried out.'

Macartney v. *Garbert*, 24 Q. B. D. 368, decides a point of some international importance. A British subject accredited to Great Britain by a foreign government is *prima facie* exempt from British jurisdiction, and therefore his household furniture is privileged from seizure for non-payment of parochial rates. The judgment of the Court is placed, as it ought to be, on the broad ground, that the representative of a foreign power has all the privileges attach-

ing to his position unless, as might happen where he was a British subject, he is received by the Crown on the express condition of his being subject to British Law. The privilege, in short, of the ambassador is the privilege of the sovereign whom he represents.

The Courts are by degrees, though with considerable difficulty, working out the problem of the proper mode of assessing income tax on insurance societies. *The Gresham Life Insurance Society* v. *Styles*, 24 Q. B. D. 500, raises a somewhat new point. The society grants annuities in consideration of a single sum paid by the applicant at the time of the grant. They claim to deduct from the amount of their profits chargeable with income tax, the sums paid in discharge of such annuities. The claim has been disallowed by the Queen's Bench Division. The decision of the Court is probably right, but the difficulty of applying the rules of the Income Tax Acts to insurance companies is so great, and the decisions of the House of Lords on the subject have exhibited so much wavering, that the Gresham Society will, it may be expected, hardly acquiesce in the rejection of their claim without carrying it at least before the Court of Appeal.

All we have to say of *Stuart* v. *Diplock*, 43 Ch. Div. 343, is that, if reported at all, it should have been reported much more shortly. The difference between the occupations of a hosier and a ladies' outfitter was hardly *dignus vindice nodus*; and another point which might have been of some interest was certainly not decided, and apparently not argued. Judges have censured over and over again the habit of producing long reports of cases turning merely on the construction of particular terms in private instruments; but the habit has not decreased.

The latest additions to our Exchanges are the Norse 'Tidsskrift for Retsvidenskab,' and the 'Western Law Times' from Manitoba, which we trust will have better luck than its predecessor the 'Manitoba Law Journal.' Our friendly relations with foreign laws and with the Common Law beyond seas now extend in longitude from Vienna to Winnipeg, and in latitude from Christiania to Capetown. British India, notwithstanding its singular wealth of legal material, is still unrepresented.

A Canadian contemporary writes:—'The Blackstone Company have completed their Series [of pirated English law books] in three years, and as they have not issued any since the 1st of November, and have made no announcement of their intention to do so, we take it that it has not been found profitable. The American Law Series [we presume a similar Series] was badly bankrupt the first year. It is reported that many thousand dollars were sunk in that enterprise.' We can only say we are glad to hear that literary dishonesty does not always prosper.

Mr. Horace Nelson informs us that the supplementary chapter upon 'National Character and Domicile' in the new edition of Wheaton's 'Elements' was not contributed but only revised by him.

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(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

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No. 64. The Scottish Judicatories—Civil Imprisonment—The Ungallant Knight.

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No. 2. The Burden of Proof (J. B. Thayer)—Elevated Road litigation (E. A. Hibbard)—Taxation of Pipes in Public Streets (J. H. Beale, jun.).

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